



The Law Society

# **Review of civil litigation costs: preliminary report**

Law Society response

July 2009

supporting  
solicitors

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## **Executive summary**

The Law Society congratulates Lord Justice Jackson on his comprehensive and thoughtful consultation paper. Much of the content of our response will appear critical. This is because the Law Society believes that the issue of costs is complex and intractable and that the timetable for the review is too short to produce results which are likely to be satisfactory. There are substantial conflicting interests and their views need to be tested closely and the likely results of reforms supported by detailed empirical research. The issue of costs covers the entire civil jurisdiction and the task of reviewing them is akin to that undertaken by Lord Woolf in the Civil Justice Review. That review took four years to complete and involved significant research and engagement with stakeholders. We would urge that, if this review produces recommendations after only a year, they are subject to rigorous testing and research and full public consultation before they are implemented. It would be preferable, however, for the review to take longer to reach its conclusions.

## **Proportionality**

Proportionality is a concept which the Law Society has always supported. However, we believe that it cannot become a bar to access to justice or the right to a fair hearing. The current civil justice system lays down minimum procedures which need to be followed in each case and, consequently, the principles of proportionality must be applied less stringently, if at all, in lower value claims.

## **Small claims track**

The Law Society is seriously concerned at the suggestion that the small claims track limit for personal injury cases should be increased. The proposal results in many thousands of accident victims losing substantial amounts of their damages awards in order to pay their own legal costs or having to represent themselves without the assistance of a solicitor. The Society estimates that this could result in over half a million litigants in person which would add to the burdens of an already under resourced court system.

## **Conditional fee agreements**

Conditional fee agreements have undoubtedly resulted in many claimants being provided with an opportunity to pursue a valid claim which they would not otherwise have been able to do due to a lack of funding. There can be no better evidence of this than the recent successful case against Corby Borough Council by children who had received disfiguring injuries as a result of negligent toxic waste disposal. Those children would not have been able to take that action had it not been for the availability of conditional fee agreements.

## **Recoverability of success fees and ATE premiums**

These should continue to be recoverable as successful claimants should not have the burden of losing a proportion of any damages awarded. This is particularly important in cases involving very serious injuries where the damages contain elements for future

care etc. Alternatively, levels of damages will have to be increased so as not to leave successful claimants out of pocket.

## **Referral fees**

These are frequently criticised as a factor which has increased costs. However, these criticisms ignore the fact that there will always be marketing costs involved in any business and that the Law Society lifted its ban on referral fees only after pressure from the Office of Fair Trading. The Society is more than willing to engage in further discussion on the subject if there is a chance of resolving this contentious issue.

## **Fixed costs**

The Law Society is not opposed to the principle of fixed costs but they must be fixed at such rates which reflect the amount of work required to prepare and run a case throughout the process applicable to the type of case and allow for a fee earner of sufficient experience to undertake that work. The rules must also allow for a case to be removed from the fixed costs process in appropriate circumstances. However, introducing fixed costs on a wider basis is fraught with many difficulties which may not be insurmountable but which will take considerable time to resolve.

## **Costs shifting**

The Law Society does not support the abolition of the costs shifting rule for any type of litigation in either the fast track or the multi track. The 'loser pays' rule acts as a deterrent to unmeritorious claims and provides successful defendants who are uninsured or self insured with an opportunity to recover their legal costs.

## **Court resources**

Our members are becoming increasingly concerned with the lack of resources in the courts which causes delay and increases the costs of litigation. There have been considerable increases in court fees in recent years but this has not produced any noticeable improvements in the courts' services. Furthermore, the Court Service is not responding to users' requirements for improved IT facilities, especially electronic filing and document management, which we believe would substantially reduce the burden of work placed upon court staff.

## **The judiciary**

Throughout the Law Society's engagement with its members there has been a unanimous view that more efficient and effective case management by the judiciary coupled with a docketing system is crucial in order to reduce the costs of litigation. However, this will involve increased judicial training

## Introduction

The Law Society congratulates Lord Justice Jackson on the production of his consultation paper. The paper is comprehensive in its coverage of this hugely complex and intractable subject. Even though there will be considerable debate and much that we disagree with, we recognise the significant discussions with stakeholders and the considerable thought that has led to this paper. The Law Society has been very pleased to have assisted in the process and looks forward to continued engagement with Jackson LJ.

We believe that the level of costs in the civil jurisdiction directly affects access to justice and dispute resolution. The civil justice system provides remedies for many thousands of people who have suffered damage or loss. Costs are a powerful incentive or disincentive for people wishing to assert their rights and it is essential that the right balance is struck between the competing interests so that perverse incentives are avoided. We are keen to support the review as it moves towards its conclusions.

It is important to note that the costs review has come at a time when there are other ongoing initiatives in civil justice which are relevant to litigation costs. For example, the forthcoming review of pre-action protocols by the Civil Justice Council and the proposed new streamlined process for RTA personal injury claims which, it is hoped, will shortly be considered by ministers. Both of these initiatives will, in the Society's opinion, subsequently prove the value of stakeholder industry solutions to resolve issues about the costs of litigation. They have also taken up considerable time. We would urge their findings to be taken into account in the review and for the review to allow them to bed down.

## Principles governing the costs regime

We also consider that it is important to consider the principles which should govern any costs regime. To us, they appear to be as follows:

- Successful litigants should not be unreasonably out of pocket as a result of the process;
- The costs regime should encourage early settlement of cases;
- Costs should ensure that cases are prepared appropriately and presented by people of the right expertise and should reflect the work involved;
- The costs regime should attempt to achieve equality of arms between litigants;
- The regime should avoid perverse incentives;
- The regime should encourage certainty;
- Litigants should have a choice of funding mechanisms available to them to suit their particular circumstances;
- Proportionality should not be an overriding consideration and, in particular, should recognise the right of people to obtain remedies and that, at times, the cost of doing so may exceed the value of a claim.

We would stress, in particular, the importance in the English and Welsh system of a separate jurisdiction for costs. While the aim of damages is to put the successful claimant, so far as possible, in the same position that he or she was before, it is

undesirable for those damages to be unreasonably reduced by the costs that are incurred in pursuing the claim.  
Our response will attempt to use these principles in looking at the various issues discussed in the report.



# **The Law Society's response**

## **1. The Civil Justice Costs Review**

### **1.1 What is the cause of the problem?**

We assume that the problem is that the costs of litigation are perceived to be too high. We note that Jackson LJ also quotes the remarks by the Secretary of State for Justice in respect of conditional fees:

'I am concerned about another element of legal services - 'No win - no fee' arrangements. It's claimed they have provided greater access to justice, but the behaviour of some lawyers in ramping up their fees in these cases is nothing short of scandalous.'

The report frequently concentrates on conditional fee agreements and personal injury claims and there appears to be an assumption that lawyers' fees are the principle cause of the problem.

We are, in fact unaware of any empirical evidence which supports that contention. What the Secretary of State appears to have ignored is that every paying party in litigation has the right to request the court to assess the reasonableness of the solicitor's bill of costs. Consequently there is ample opportunity for the court and the paying party to discover cases where lawyers may have 'ramped up' their fees and to take action accordingly.

In fact, costs are driven by a number of issues. These include:

- The behaviour of the parties and their decisions about how to conduct litigation;
- The processes that are required by the courts in order for the litigation to progress, including the instruction of experts;
- The legitimate costs of lawyers as businesses who also owe substantial duties to their client and to the court;
- The actions of third parties involved in funding cases, such as insurers;
- Inefficiencies within the court service and the decision to stop the Electronic Filing and Document programme is likely to result in increasing costs which, with modern technology, should be unnecessary;
- Decisions of the judiciary in the conduct of cases

None of these can be looked at in isolation and it essential that the review should recognise that the costs charged by lawyers will be determined by all of these factors.

### **1.2 The Civil Justice Council**

The Civil Justice Council (CJC) has proved to be one of the most successful recommendations of Lord Woolf. The Council was established under the Civil

Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system. The Council has been very successful in this work and, since its inception has identified a number of costs issues which it has discussed with stakeholders and produced two reports on costs<sup>1</sup>.

The CJC has excelled in bringing relevant parties together to discuss problems and resolve them by negotiation and mediation. The Society considers that any proposals in the final report should be referred to the CJC for full consultation and continuing discussions with all relevant stakeholders. Any attempt to do so before will, we believe, be premature.

### **1.3 The scheme of the preliminary report**

The purpose of the report is stated as 'to review the operation of the costs rules and to examine possible means of reducing the costs of civil litigation whilst promoting access to justice.'

The Law Society supports this aim, but has substantial reservations about some of the proposals, notably those in respect of the small claims limit and others, many of which may well result in significant damage to access to justice.

We would also counsel against placing too great an emphasis on proportionality. People are entitled to seek remedies in court, whatever the value of the claim. There is a mandatory minimum amount of work involved in making all claims and consequently proportionality must itself be considered proportionately. At the Costs Review seminar on 26 June 2009 Professor Dame Hazel Genn gave a preliminary analysis of the costs data in Lord Justice Jackson's preliminary report during which she concluded that in respect of the proportionality between damages and costs 'the amount of work done on a case is a reflection of many factors and that there appears to be an irreducible minimum amount of work that must be done even to recover damages of £2,000 or less.'

It would be unacceptable to penalise litigants or limit their access to justice in such cases. Moreover, many litigants are not simply litigating for the money: they see the courts as existing to provide a sense of justice. This clearly should not preclude early settlement of claims, but it needs to be taken into account in considering access to justice.

It is also worth saying that there has been a major switch away from state funding of litigation. Decisions about whether cases should be funded and the fees that should be paid to lawyers were, in a substantial number of cases, taken by the state until the virtual abolition of civil legal aid. What has happened is that the private sector, notably the insurance industry, solicitors and, increasingly, other commercial funders, are taking those decisions and are providing the funding. These are all profit-making businesses and, while the efficiencies associated with the private sector may be obtained, so they have a commercial imperative to make a profit and this transfer has had the inevitable effect that the costs of litigation have been transferred from the taxpayer to the industry itself and it is scarcely surprising that costs have gone up as a result.

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<sup>1</sup> Improved Access to Justice – Funding Options & Proportionate Costs (August 2005) and Improved Access to Justice – Funding Options and Proportionate Costs – The Future Funding of Litigation – Alternative Funding Structures (June 2007)

## **1.4 The costs rules and the costs war**

### **The indemnity principle**

The indemnity principle was, in the Law Society's view, the main cause of the 'costs wars'. This principle has, in effect, led insurers to challenge the terms of solicitors' retainers and, in effect, to gain a windfall if those are, for some reason, technically defective. Their attempts to do so have resulted in the many hundreds of 'costs only' litigation cases which have plagued the civil justice system for several years and which have unnecessarily taken up the resources of the county courts, the SCCO and the Court of Appeal.

In the Law Society's view, it is inherently wrong and contrary to the public interest for the unenforceability of a solicitor's retainer to result in a windfall for the unsuccessful defendant. The work has been done by the solicitor perfectly legitimately and he or she should be paid for it.

The Law Society has no brief for solicitors who deliberately enter into agreements which are contrary to public policy or which breach rules, but the concept of unenforceability is now outdated and cumbersome. Solicitors are now heavily regulated and it would be more appropriate for such breaches to be addressed by the regulator. This would remove substantial costs and time out of the court system.

### **The 'costs wars'**

As suggested above, the 'costs wars' have mainly been concerned with insurers' attempts to avoid payment of costs to the claimant's solicitor based upon technical breaches of the rules. One cannot blame insurers for seeking to do this: the law gave them a weapon which they were entitled to use to maximise profits for their shareholders.

The report raises a number of events which undoubtedly disclosed problems with the existing regime. However, they were not simply about lawyers' fees. In the credit hire cases, insurers raised objections and arguments because they considered that the hire charges by car hire companies which had no affiliation to a particular insurer were excessive. This continues to be an issue for insurers but has nothing to do with the costs of the dispute resolution process.

Similarly, the litigation associated with Order 17 Rule 11 was not primarily about costs. It was about defendant's attempts to avoid payment of damages and costs as an added consequence for a client's failure to comply with the court rule. It is worth repeating the Court of Appeal's comments here:

'During the course of the present exercise we have identified more than 30 points of general application which still remain unresolved over six years after the introduction of the new automatic sanction. This lamentable history surely provides an object lesson of the reasons why draconian new rules should not be introduced into litigation practice

without being first submitted to a widespread and appropriately critical consultation process.<sup>2</sup>

The costs regime undoubtedly can be used to influence the behaviour of parties but, in doing so, it becomes a weapon in the hands of the parties which can lead to further costly litigation which is disproportionate to the original problem. The Society considers that no changes to existing costs rules should be implemented without the type of widespread and critical consultation process which the Court of Appeal envisaged.

## **1.5 The role of the civil courts**

The Law Society has serious concerns about the efficiency of the civil court system. If we are to have a civil justice system which is to provide access to justice at proportionate cost then the courts must be provided with sufficient resources to play their part. The Society receives many complaints from its members about the management of individual courts, the listing of hearings and administration of cases generally which causes delay in the progress of cases and increases costs significantly. Regular increases in court fees have not, regrettably, resulted in improvements in efficiency.

It cannot be over-emphasised that the inefficiency and under-resourcing of the civil courts increases costs. Experienced solicitors practising in a number of county courts and district registries estimate that 10-15 per cent of litigators' time is spent on unnecessary work required by the court. The following list provides examples of the issues which arise regularly in the majority of courts.

- backlogs in dealing with post means that steps taken in the litigation process are either pointless or need to be repeated;
- delays in drawing orders necessitate extra or repeat work by the parties (for example, where a deadline has already gone by when the order is received and a further application needs to be made to resolve the problem);
- failures by court staff to answer the telephone or deal effectively with queries;
- some courts charge a solicitor who comes on the record following a change of solicitor for copies of orders made in the case so far. Additional correspondence is necessary for the matter to be dealt with as well as the fee;
- many courts do not automatically list interlocutory hearings on the telephone despite the practice direction, and considerable efforts are often made by the parties writing, ringing and faxing to try to establish whether or not an attendance is required;

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<sup>2</sup> Bannister v SGB Plc & Ors [1997] EWCA Civ 1524

- some judges dislike telephone hearings and insist on personal attendance, thereby increasing costs;
- interlocutory hearings often need to be moved or vacated but efforts to explain this are to no avail and so they go ahead simply to be re-listed by a district judge and the two advocates need not have attended at all;
- in some courts, staff now require an application to be made where a letter would have sufficed – the suspicion is that this enables them to charge a £75 fee – and this causes further expense.

Many practitioners report that the experience of litigating in our county courts is overwhelmingly one of frustration. Files are regularly lost. District judges routinely do not have papers faxed in three days ahead of a hearing and explain to the parties that they should of course know that it takes far longer than that for a piece of correspondence to reach the file.

The amount of cost which is attached to this is hard to estimate because we should not only look at the direct effect of those letters/telephone calls/hearings being wasted. The fact that matters are not appropriately progressed because of this inefficiency has clearly influences the overall time it takes to have a court action concluded and, therefore, on its cost.

## **2. The basic facts**

### **2.1 How much civil litigation is there?**

The Society notes the statistics in the preliminary report on the distribution of work within the civil court system. We note in particular that it is estimated that less than 10 per cent proceed to trial. We believe that this is a good figure, suggesting that many of the Woolf reforms encouraging early settlement have been successful.

### **2.2 The broader picture**

This chapter reproduces statistics provided by the Legal Services Commission (LSC), a liability insurer and other organisations. It is clear that some of the statistics conflict with each other and would need further investigation before any further comment could be made, particularly those from the LSC. It is, however, important to make the point that, in a very high proportion of cases, Government is the ultimate funder, in that many actions are against the NHS or other public body. In our view it may well be cheaper for the taxpayer for the claimant's costs to be paid for under the legal aid scheme rather than for their costs to be increased by success fees. We believe that there should be research into the level of costs now being paid overall by public bodies in such matters compared with the equivalent costs before legal aid was severely reduced.

## **2.3 Court fees**

The Society agrees with Jackson LJ's views that the Ministry of Justice (MoJ) should reconsider the latest proposals to increase court fees.

The Society's response to the 2008 MoJ consultation on court fees stated: 'The Law Society continues to be fundamentally opposed to the Government's policy of full cost recovery. We accept that there is a cost to running the court system and that it is appropriate for litigants to be charged a fee towards that cost, if only to discourage frivolous litigation. However, it must be set at a level which enables there to be proper access to justice for all in society. We are concerned that any policy which seeks to obtain full recovery of the costs will undermine this by potentially setting a level of fee that will discourage people from bringing legitimate disputes. This applies particularly for those on low incomes but who, nevertheless, do not qualify for fee concessions. The impact of the continuing policy of full cost recovery is therefore likely to exclude more people from the civil justice system.'

This continues to be the policy of the Law Society and for the benefit of all court users we urge the Government to review its policy of full costs recovery and the cross subsidising of the various civil courts.

## **2.4 What do lawyers earn?**

While solicitors fees are obviously a major driver in the costs of civil litigation, the Law Society believes that considerable caution needs to be taken before perceptions about the level of those earnings should influence decisions on costs.

Solicitors operate in a fiercely competitive market. In the field of civil litigation they are frequently dealing with sophisticated clients, such as insurers and major companies who are well able to exert a downward pressure on fees. If the fees are unreasonable, these can be challenged in court.

Solicitors also operate in competitive market for talent and clearly will wish to ensure that the rewards available are competitive with other professional providers. Civil litigation is rarely the sole activity of any firm: indeed, in most firms, non-contentious work will form the bulk of the work. It would be unfortunate if a perception of the earnings of lawyers were to result in a reduction in the fees in one area of work so that result firms either considered it unprofitable to do the work or moved their more talented staff to other areas. The Law Society does not accept that lawyers' earnings are significantly out of step with providers of other professional services, given the market in which they operate.

It is important, we believe, to distinguish between the amounts that solicitors earn (as determined by their hourly rates or other methods of charge) and which are, we believe, a function of the market, and the activities for which they can charge. The Society holds no brief for the solicitor who is inefficient or charges for unnecessary work. Fees need to be set at a level which rewards the efficient solicitor. However, the earnings of solicitors are not a meaningful way of setting these.

The Law Society has particular concerns about the interpretation of the data referred to in this chapter. Some of the figures are out of date and are from different years, so like is not being compared with like. The averages quoted are based on such a range of practitioners that it is impossible to make any generalisations from them. For example, in tables 8.1 and 8.2 firms 1-25 employ over twice the number of partners as firms 26-100 combined (equity or salaried). Therefore figures even for the top 100 are going to be unfairly weighted by the strength of the very top firms. Similarly, single practitioner firms and top 100 firms have been combined to get an average remuneration of £98,616. However, in paragraph 2.14 Jackson LJ refers to the fact that some sole practitioners earn less than £15,000 per annum from their practice. He also states (paragraph 2.19) that 11,387 equity partners are in the top 100 firms. Comparing the 4,500 sole practitioners with the 11,387 equity partners of the top 100 firms will achieve a misleading result. It should also be noted that much of the work of the top 100 firms involves banking and international finance and not dispute resolution.

### **3 Research, consultation and investigation**

The Society regrets that it was unable to assist Lord Justice Jackson with his request for assistance with a detailed survey of solicitors for the purposes of his review. Regrettably, the time frame allowed would have been insufficient and the extent of the information requested could only have been obtained at significant cost which the Society was not able to provide. It cannot be overstressed that the findings of this review need to be bolstered by significant professional research.

### **4 The funding of litigation**

#### **4.1 Legal Aid**

##### **Contingent funding**

The Society opposed the removal of legal aid for the majority of civil work. Regrettably, it also recognizes that, particularly in the present economic circumstances, it is inconceivable that it will ever be replaced.

Legal aid is an important way of providing access to justice to those who could not afford it. However, the proportion of the population eligible for public funding and the types of cases for which such funding is available have decreased significantly since 2000. Its critics argued that:

- it did not cover a substantial proportion of 'middle England' who were not financially not eligible for legal aid but, nevertheless, were unable to afford the cost of litigation or to take the risk of failure;
- there was a 'one-way costs shifting' regime in most cases. This caused injustice to successful defendants and their insurers who perceived that there was little incentive for the legally aided litigant to act reasonably, despite the rigid cost control and the introduction of the cost/benefit ratio, which should have allayed

these concerns.

The advent of conditional fee agreements and ATE insurance was seen as addressing both these issues. Litigants' incomes were not relevant in determining whether or not they could take action and defendants could receive their costs. There are now complaints from the insurers about the cost of the ATE premiums they are required to pay in successful cases. However, it provides a significant service and way of enabling access to justice for those with legitimate claims who are concerned about risk. There are, however, concerns about access to justice in respect of more complex claims which will be less attractive to funders. The removal of the taxpayer as a significant funder of litigation, has meant that the costs have been taken up in part by the industry itself.

## **4.2 Before the event insurance**

### **Legal Expense Insurance**

The Law Society agrees that BTE insurance has an important role to play in the funding of litigation. We also accept the distinction made by Jackson LJ between what he calls 'BTE 1' and 'BTE 2' and that 'BTE1' is the preferable model.

The report does not however give, in our view, adequate attention to the way in which the market is manipulated by BTE insurers so that clients are not free to choose the solicitor of their choice. Their role as funders and gatekeepers gives insurers significant power in their relations with solicitors and clients. Claimants wishing to take advantage of his BTE policy either instruct their own solicitors and are refused funding unless they agree to instruct a panel solicitor, often in a different part of the country, or are referred direct to their insurer. The Association of District Judges has made known to the Law Society, during 2008, its concerns that this system frequently operates as a denial of justice to claimants who lose, under-settle or do not pursue cases as a result of the nature of representation provided.

The problem arises out of section 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 ('The Regulations'). This appears to enshrine freedom of choice by clients; but this is available only in respect of 'any enquiry or proceedings'. Insurers take the view that proceedings do not commence until a claim is actually issued; even the protocol procedure is deemed by them not to be 'proceedings'. This is contrary to a view expressed by Brooke LJ in *Crosbie v Munro* [2003], in a different context. By the time an actual claim is issued, the client feels that it is too late to change to their preferred solicitor. The Ombudsman has upheld this view other than in certain cases which are complex and in clinical negligence.

The three BTE issues which need to be resolved are:

- i) The insured has no say in the terms of the contract between the insurer and the panel solicitor and therefore has less influence in the handling of the case than a client who does not have the benefit of BTE.
- ii) The solicitor panels are restricted by insurers and there are frequently issues regarding the lack of freedom of choice of a client's own solicitor. The Law Society considers that freedom of choice of solicitor is important in the public interest. It is essential that the litigant should feel confidence in his or her legal advisers and will



enhance the integrity of the system. Secondly, the litigant will be able to assess the competence of the firm directly and take action if dissatisfied.

lii) The definition of proceedings in the Regulations and how this is interpreted. The Law Society's view is that any extension of BTE should be subject to the agreement by insurers that the definition of 'proceedings' under the 1990 Regulations includes the pre action protocol procedure or by clarification of those Regulations.

## **Referral Fees**

Referral fees are a difficult and contentious issue but, given the existing regulatory and market regime, it is difficult to see how they can be abolished. Until 2004, solicitors were banned from paying referral fees. The ban was lifted, reluctantly, by the Council of the Law Society for a number of reasons. These included:

- the view that solicitors needed to be able to compete on a level playing field with other legal services providers who were not prohibited from paying for this work; and
- advice that the ban was likely to breach competition law; and
- strong arguments that the payments would be made anyway but through arrangements which were disguised and complex.

The Law Society's current policy is that it supports solicitors paying referral fees while other providers are permitted to do so, but would support a review to see whether it would be practical to prohibit payment of such fees altogether.

The growth of CFAs encouraged the growth of a number of claims management companies (previously known as 'claims farmers') who acted as intermediaries between solicitors and those who had suffered an accident. They are able to provide modern marketing methods which are outside the expertise of most solicitors. Some also carry out initial assessments of whether a claim is likely to succeed and some may undertake some investigatory work that is otherwise done by solicitors. It is true that, in respect of some of them, their marketing and other practices were dubious or illegal. These concerns were recognised and, in respect of actions in respect of personal injuries, criminal injuries compensation, employment, financial products and other claims, these organisations are now regulated by the Claims Management Regulator.

Solicitors pay referral fees to claims handlers because it provides them with access to work. They cannot compete with the large marketing budgets of these firms. Some argue that paying a referral fee is the most cost-effective way of obtaining work and, if they were unable to have relationships with claims handlers, their overheads would be increased considerably, although no research has been conducted on this.

It is also strongly arguable that claims management companies are highly successful in enabling those who have suffered injury to gain redress. They have played a strong role in educating the public about their remedies.

Against this, it is arguable that the payment of such fees may affect client choice of solicitor and may well put pressure on the solicitor's duties to the client. Some of the fees are so high that it is difficult to understand how solicitors can make a profit and maintain standards, particularly in a fixed fee regime.

The Law Society lifted the ban reluctantly because of these concerns. However, since the ban has been lifted, the Law Society considers that solicitors should be able to pay referral fees if they wish and if it suits their business model. Solicitors are highly regulated professionals and the overwhelming majority will be able to take the business decision as to how much they are prepared to pay for work without compromising their duties to the client.

Insurers argue that the payment of such fees increases costs. We doubt whether this is the case for the reasons given above and it is hard to see how it can be correct in the present system of costs recovery. In addition, we note that many insurers themselves require solicitors to pay referral fees to them. Some may, therefore, regard their concerns as surprising.

The Law Society notes, however, that there is no empirical research as to the effect of referral fees on costs or on solicitors' practices. The Society would urge that no action is taken against referral fees until there has been proper research as to their effect on costs, access to justice and the behaviour of solicitors.

### **4.3 After the event insurance**

After the event (ATE) insurance provides an important guarantee for litigants that they will not be at risk of paying the costs of the other side if they lose. There can be no guarantee that any claim will be successful and the fear of having to pay substantial costs in the event of loss is a major deterrent for many claimants. The courts have decided that it is appropriate for the cost of the ATE premium to be recovered. The Law Society supports this view. Indeed, it could be argued that, for a defendant insurance company to have to reimburse the cost of ATE premiums to Claimants is, taking the insurance industry as a whole, an internal accounting matter with no net effect on the insurance industry which has been referred to above.

Even if this view is not correct, the Law Society considers that, given the cost of ATE insurance, it is appropriate that this should continue to be recoverable.

Insurers have continued to complain for several years about the high cost of recoverable ATE premiums and that referral fees increase the costs they have to pay. However, it is insurers who provide (i.e. sell) the ATE cover in the first place and they are also the recipients of a significant proportion of the referral fees which are paid by solicitors.

It has to be remembered that they also provide liability insurance and it is a fact that a single insurance company is frequently funding both side's costs (i.e. BTE or ATE cover for the claimant and legal costs cover under the liability insurance policy for the defendant). Added to this is the fact the same insurance company has received referral fees as part of that process plus the premiums for the insurance policies from both parties to the claim (see appendix). The Law Society considers that it would be helpful to have research and transparency about the costs of ATE insurance. At the moment, there is no wide understanding of the risks involved or of the profitability of these products.

## 4.4 Third party funding (TPF)

Agreements involving a third party who supports legal proceedings without being a party to it have, historically, been held to be unlawful under the law of maintenance and champerty. In recent times, however, the law has changed, mainly driven by judicial decisions. Gradually the courts have moved away from declaring what were champertous agreements unlawful and have also made the third party funder of an unsuccessful party liable for all of the successful party's costs.

TPF is now established and has been accepted by the courts as a lawful means of funding litigation. It is undoubtedly a method of funding which may be available to litigants in circumstances where no other method of funding (for example, ATE insurance) is available and/or where, for example, a commercial client may not want to risk own funds in return for 'losing' a proportion of the value of the claim. It is likely to be of particular interest in group or other high value actions.

At the moment, TPF is an unregulated activity. There is no statutory limit on the percentage charged as a contingency, although it is likely that the factors dictating this are commercial (most funders require a return of 3 or 4 times their potential exposure) and dependent on the merits of each particular case. Nor is there certainty about the extent of the liability for third party funders.

There are a number of concerns arising out of this lack of regulation. For example:

- the relationship between the client and a funder is contractual and the contract is likely to provide for the funder to withdraw the funding in certain circumstances, which could be contrary to client's interests or unreasonable;
- there is no guarantee or protection against a third party funder becoming insolvent and therefore having to withdraw funding prematurely and/or being unable to meet its liability under the terms of the contract, which would leave the funded party being liable for his/her own costs and disbursements and, possibly any adverse costs order in the absence of ATE cover.

These issues could be dealt with statutory recognition and regulation of such agreements. For example, strengthening the security for costs rules would help to avoid the problem of insolvency and would also be a considerable deterrent against rogue traders.

Rule 9.01(4) of the Solicitor's Code of Conduct (Referrals of Business) is interpreted as preventing solicitors from acting for a personal injury client with the benefit of third party funding. The Law Society considers that it may assist access to justice for this rule to be abolished. In the meantime, greater certainty about the status of such arrangements would assist.

In general, the Law Society believes that properly regulated agreements of this sort may well assist access to justice and that it is right for clients to have a choice of funding arrangements available to them.

## **4.5 Conditional Fee Agreements**

Conditional fee agreements were the subject of considerable criticism when they were introduced. Despite the 'minority' view expressed by the Personal Injuries Bar Association there is no empirical evidence to substantiate the argument that CFAs have brought the civil justice system into disrepute or have led to huge conflicts of interest. We recognize concerns about the objectivity of advice because the lawyer has a vested interest in the outcome of the case but believe that this is being managed. Solicitors do so every day without difficulty and in accordance with the requirements of their professional rules. Any fee arrangement is going to give rise to conflicts of one sort or another and those raised by CFAs can be managed by professional, highly regulated solicitors.

It is also notable that, so far, there is no reported evidence of significant damage to clients arising out of these agreements. So far as we are aware, there has been no increase in negligence litigation or disciplinary complaints arising out of them. The consumer bodies do not report any concerns about under-settlements or conflicts of interests. It is likely, given that almost a decade has elapsed since they have been permitted, that such problems would have been noted if they had arisen.

### **Criticisms**

The fact that clients have no interest in the costs being incurred is often raised as a criticism of CFAs. However, there are two sides in any case and costs are sometimes incurred unnecessarily by the defendant's failure to admit liability at an early stage. Clients also have an interest in an early settlement. Costs are also incurred by front-loading required by the CPR. Solicitors' costs are subject to detailed assessment and the court is in a position to ensure that costs are incurred appropriately. Where there is a fixed fee, the incentive is on the claimant's solicitor to keep costs low.

It has, in fact, become common for a solicitor acting under a CFA to offer to accept 'staged' success fees dependent on early settlement and at what stage the proceedings have reached when settlement is achieved.

It has also been suggested that the level of success fees are too high given the level of risk in individual cases. The Society agrees that the level of success fees needs to be considered further but not by reference to individual categories of work as proposed. This is because the type of work does not determine the risk, which will vary according to the case. Empirical evidence needs to be obtained about the level of success fees and how they are, and should be, calculated by reference to risk and merits of a particular individual case, not a particular category of work.

### **Specific questions**

- (i) Are CFAs in their present form satisfactory?

Yes. They have enabled many substantial numbers of litigants, and not just personal injury victims, to obtain redress through the courts which would not otherwise have been possible. They are therefore crucial for access to justice reasons.

- (ii) If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process?

Apart from the possibility of reviewing the level of success fees and their calculation, the Society considers that no reform is necessary. The repeal of the Conditional Fee Regulations 2000 by the Government has had a beneficial effect on CFAs and they should therefore continue in their present form. It is possible that improvements may be necessary, but we feel that this should be after proper research.

## **4.6 Self financing**

It is obviously open to individuals and organizations to finance litigation themselves. For many businesses and SMEs, the level of excess on their BTE insurance policies in practice makes this the only sensible option for small amounts. For most individuals, however, this is not practical.

## **4.7 Is there a case for a CLAF or SLAS in England and Wales?**

The Law Society recognises that there are superficial attractions to a CLAF or SLAS. It would, for example, address the perception of a conflict of interest between lawyer and client and the idea that it could be used to assure funding for more complex and expensive cases is attractive. There are, however a number of problems and the Law Society sees no reason to amend its statement in *'Protecting Rights and Tackling Social Exclusion – Proposals for the Future Delivery of Legal Aid Services'*, which said:

'The Society has long argued that a Contingency Legal Aid Fund (CLAF) is not viable in a system where individual CFAs are permitted. In its response to the then Government's Green Paper on legal aid in 1995, the Society recommended the establishment of a Conditional Legal Aid Fund, initially in personal injury cases. However, the Government preferred to rely on individual CFAs, with recoverable success fees. Now, in the absence of abolition of CFAs, it is difficult to see what benefit might be achieved through the establishment of a CLAF.

'Moreover, a CLAF would need to be funded either from damages awarded to an individual or from the success fee paid to the solicitor acting under a Conditional Fee Agreement. It would be wholly inequitable to require a successful litigant to go without part of their damages in order to fund a CLAF. Similarly, where solicitors have taken the risks associated with entering into a CFA agreement, it would be wrong to require them to forego a portion of the success fee in order to fund a CLAF.

'The Society does not see a role for a CLAF, in view of the Government's preference for CFAs and the removal from scope of legal aid matters capable of being funded by CFAs.'

We consider that, if anything, today the arguments against a CLAF are even stronger. This is because:

- 'cherry-picking' is likely to happen and it is hard to see why a solicitor or client should favour a CLAF over a CFA or contingency fee;
- If CFAs are banned, the scope of the scheme will need to be widened significantly to cover any member of the public whose action was not covered by insurance or some other arrangement – this would become unwieldy and disproportionate to the problem – since the argument presumably is that CFAs are undesirable for ethical reasons and do not provide access to justice, then this system would need to encompass defamation, employment and other actions where CFAs or contingency fees are involved, otherwise there will be significant inconsistency;
- The administration of the scheme will be cumbersome and subject to judicial review if, in effect, it is the only CLAF funding body. If it were run by Government there would be concerns about how appropriate it is for it to be the sole avenue for such funding.

No evidence has been shown about the damaging effects of CFAs to justify banning them and we consider that it is likely that, if anything, they have substantially increased access to justice. We believe that, in principle, it is right that litigants should have a number of funding options. If this is agreed, then a CLAF will inevitably find itself being the under-writer of the least attractive cases. For this reason, we consider that a CLAF is likely to be impractical.

The Civil Justice Council has previously canvassed stakeholders about their views on a Supplementary Legal Aid Scheme (SLAS). There was an overwhelming view that this would not be viable in England and Wales and that it was likely that the Government would use the assets of the SLAS fund to supplement the Legal Aid fund. This is a view which, to the Society's knowledge, has not changed.

## **4.8 Contingency fees**

The Council of the Law Society has previously decided that contingency fees in contentious business matters should be prohibited. The Society has, however, undertaken a consultation exercise with its members, the results of which will assist the Council with reviewing its existing policy. A detailed analysis of those results will be considered by the Council in Autumn 2009. It is notable that contingency fees have been operating, broadly successfully in employment and similar Tribunal cases. While the Society recognizes that there have been a number of concerns about how these operate, particularly by unregulated providers, we believe that these can be dealt with by appropriate regulation.

# **5 Fixed costs**

## **5.1 The present fixed costs regime**

### **Road Traffic Accident Claims**

In October 2003 a scheme was brought in for fixed costs for road traffic accident (RTA) cases with a value of up to £10,000 which are settled before the issue of proceedings.

This scheme was brokered by the Civil Justice Council and achieved agreement of all the stakeholders. It captured a high percentage of all personal injury claims. It was based on the view that there was a strong correlation between damages and costs in such cases, which was capable of being expressed in a formula which was subsequently proposed. The formula was £800 plus 20 per cent of the damages up to £5000 and 15 per cent of the damages thereafter.

The Law Society agreed to the scheme broadly based on this research. The key features of the scheme were:

- i) That the fixed costs fairly reflected the actual cost for working up such cases to settlement as it was based on recent research.
- ii) There would be an annual review which was intended to raise the fixed costs in line with the RPI as Solicitors had bitter experience of fixed costs in legal aid cases which were not reviewed for years after being fixed.
- iii) There would be an escape mechanism for exceptional cases.
- iv) Costs would be paid according to the formula within 14 days of settlement.

The Law Society supports the principle of such schemes. It is important to note, however, that a number of aspects of the agreement have not materialised. There has never been a review despite an annual review being a term of the agreement between the parties (this was ignored by the Civil Procedure Rules Committee). The result of this is that, as salaries tend to rise by an index higher than RPI which is lower than the relevant earning index there has been a real reduction in the costs recovered.

In addition, the escape mechanism has rarely succeeded or been invoked. This is because the exceptionality test is high and where costs are much higher than the fixed costs, there are usually reasons to issue proceedings. There are hardly any reported cases on escape.

Finally, costs are not usually paid within 14 days. Even now, insurers regularly dispute success fees, ATE premiums and experts' fees. On occasions, insurers have claimed that no costs are payable because of, for example, an alleged failure to investigate BTE. These steps have led to satellite litigation which, again, has increased the overall costs of the system. The promise to pay promptly has therefore not been universally honoured.

If these issues could be resolved, the Law Society considers that this model is a useful one for similar schemes.

### **Are existing personal injury fast track costs too high?**

There is no evidence to suggest that this is the case. The anecdotal evidence from the profession is that margins are low, particularly if referral fees are paid.

## **5.2 Should there be a comprehensive fixed costs regime in the fast track?**

### **The principle of fixed costs**

The Law Society is not opposed in principle to fixed costs in the fast track, providing that there is the option to apply to remove the case from such a scheme if significant costs are envisaged at any stage. We also consider that it is too ambitious to try to fix costs for all PI cases and all other fast track cases at this stage. Any proposal to do so should be delayed until the proposed RTA streamlined claims process has been evaluated. To extend the principle of fixed costs could adversely affect access to justice or increase the number of unrepresented litigants bringing claims.

It also needs to be made clear that any fixing must take account of the processes. In the Law Society's view, fixed costs will only reduce overall costs if changes to the process are made. If reductions are made without such changes then the likely effect may well be that solicitors will seek to recover any shortfall from the client. This means that there is likely to be further pressure on the principle, which the Law Society supports, that the client should not lose money from their damages.

### **Housing cases**

Historically, housing cases have always been treated differently to personal injury claims. Illegal eviction & housing disrepair matters below £5,000 have not been allocated to the small claims track for the simple reason that those drafting the CPR were aware of the very real complexity of housing matters. The review does not appear to have considered this history and focuses attention on a one size fits all solution. The Law Society does not believe that you can compare accidents at work with 'all other forms of housing litigation'.

Housing cases relate to a person's home. They can be very complex, especially when they may result in a client losing their home. Whilst some forms of housing disrepair cases can be relatively straight-forward, many cases arise by way of counter-claim in possession proceedings and the issues become far more complex. Equally, homelessness appeals are very difficult pieces of litigation which are invariably handled by specialists.

Table 22.3 in the review seems to take a too simplistic approach to housing litigation and we believe this to be the wrong approach.

### **Key elements of fixed costs**

If, despite the above, it is determined that a fixed cost regime should be introduced for fast track claims, the key elements must be as follows:

- i) The costs must be fair and must represent the current cost of doing the work. This will require careful evidence gathering and surveys.
- ii) There must be an annual review (this is conceded in para 2.17 of chapter 22 of the preliminary report)



- iii) Proportionality appears to be the starting point for the proposed matrices and this will cause considerable problems for cases where the value may be relatively small but, where, as Hazel Genn has suggested, there is an irreducible minimum of work, it would be unacceptable for consumers effectively to be deprived of a remedy because the level of the claim was low.
- iv) There must be a fair 'escape clause' which provides the right to recover costs actually incurred where the issues in the case and the interests of justice so require. Also, either party should have the right to apply at any stage if the circumstances of the case requires,
- v) The scheme must ensure that a fair amount of costs is recovered so that claimants get their damages and their solicitors are paid fairly for the effort in achieving this. As most cases are driven largely by defendant insurers to their conclusion, the amount of work done will be dictated by them. It will be unfair if such work is not paid for because of a restrictive scheme. The current emphasis seems to be weighted towards savings for defendants and insurers.
- vi) There needs to be careful provision for additional factors which can include:
  - Multi defendants
  - Language difficulties
  - A child or patient client
  - Multi experts required
  - Cases involving psychiatric as well as physical injury
  - Self employed claimants
  - Numbers of witnesses
  - Contributory negligence
  - Fatal cases and inquest costs

As Professor Kritzer says in his working paper<sup>3</sup>, 'the interaction of factors in cost systems is complex and every fee system creates conflicts and incentives. Predicting how the incentives balance out is complex and difficult. 'Reformers think specifically about the positives they seek to achieve, identifying the possible perverse incentives is difficult and often overlooked.'

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### 5.3 Should there be a fixed costs regime above the fast track?

The Law Society does not support the extension of any fixed costs regime above the fast track. The work involved in those types of cases is far too wide ranging and complex and the system would become unworkable. There would be significant problems for solicitors taking on such work and we believe that it would only work in the simplest of cases.

Costs budgeting could be an option but this would need to be given a great deal of further thought as it does not negate the conflict involved.

## 6 Personal injuries litigation

### 6.1 What should be the upper limit for personal injury cases on the small claims track?

The Society very much regrets that increasing the small claims track limit for personal injury claims has once again been raised. Much work and resources have been spent on this topic in the past few years and it is pertinent to note that the Government has agreed that it would be wrong to increase the limit.

The small claims track ensures access to justice by allowing small, straightforward claims to follow a simpler process without incurring significant costs liability. While it may be true that a number of claims under £5000 are simpler, so people can handle them without expert advice, this does not apply to personal injury and housing disrepair claims.

Raising the small claims limit will deprive many injured people of legal advice. Personal injury cases usually involve complex issues of causation, liability and evidence and are too complex for most people to handle without help from a solicitor. Defendants will usually be represented by an insurance company receiving expert advice. Many claimants will not pursue the matter because the evidence is complex, and an insurance company may be pressuring them to drop a claim or settle. Many insurers are doing just this and this will be exacerbated by an increase in the limit.

#### Statistics

A Law Society survey<sup>4</sup> on small claims showed the following:

- **82 per cent** of solicitors said that over 80 per cent of clients required legal advice on claim value
- **82 per cent** of solicitors said that over 40 per cent of cases conclude before issue of proceedings

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<sup>4</sup> Source: Law Society survey on small claims – June 2006

- **78 per cent** of solicitors said that over 40 per cent of cases conclude after issue but before allocation to the small claims track
- **99 per cent** of their clients would **not** have pursued the claim without the help of a solicitor.

A MORI survey conducted by APIL (Association for Personal Injury Lawyers) 5 found that:

- **66 per cent** of people who suffer an injury through someone else's negligence would not pursue it through the small claims court without an independent solicitor helping them.
- **80 per cent** of respondents felt they would not be offered the correct level of compensation by Insurers.

Research conducted by UNISON with 1000 trade union members about their claims showed that:

- **63 per cent** of those members would not have proceeded with their case or felt confident about going before a judge without legal representation and
- **66 per cent** believed their cases would not have been dealt with fairly without the help of a lawyer<sup>6</sup>.

Based upon statistics it is safe to conclude:

- If the small claims limit is increased from £1000 to £5000 over **75 per cent** of consumers could stand to lose access to legal advice.
- Without proper legal representation, consumers run the risk of recovering only 50 per cent of the true value of their claim (APIL membership survey 2005)<sup>7</sup>.
- That the existing small claims system operates effectively and efficiently.
- Solicitors help consumers obtain the fair redress that they are due.

### **The Government's view**

In December 2005 the Constitutional Affairs Select Committee published its report, '*The Courts: small claims*'.<sup>8</sup> Three of the recommendations were as follows:

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<sup>5</sup> Source: Fast and Fair – Law Society publication Sept 2006.

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> HC519

- 1 The Department (MoJ) must place greater priority on providing adequate IT facilities to the county courts. While the provision of IT equipment and electronic documents management software might be expensive in the short term, there would be clear scope for greater efficiencies if the current paper based system could be at least partially replaced, and service to the public would be improved.
- 2 The Small Claims limits for personal injury and housing disrepair case are in need of reconsideration. It is plain that some minor injuries that were originally intended to fall within the small claims system and which have no medium to long term health implications for claimants, now fall outside the system. Claims for personal injuries which are worth less than £2,500 could be considered under the small claims system without unduly disadvantaging claimants.
- 3 In order to give consistency of approach, it would be sensible if the limit for housing disrepair cases was raised by the same amount. When considering the housing disrepair limit, however, it will be essential to ensure that vulnerable tenants are not unduly disadvantaged by any change. Any such disadvantage in both types of case could be ameliorated by better provision of advice and support before the parties attended court.

In February 2006 the Government response<sup>9</sup> stated:

#### Recommendation 1

‘The Government accepts the Committee’s comments and agrees that there is a need to enhance IT facilities to improve customer service and efficiency generally. However, as the Committee acknowledges, there are financial constraints which dictate the speed and scope of progress that can be achieved in this area. .... The Government recognises that in order to provide access to justice it is necessary to ensure that litigants are provided with proper information and advice when bringing and responding to claims.’

#### Recommendations 2 and 3

‘The Government has undertaken to consider all the case track limits. In doing so, it recognises that there are concerns about the potential lack of legal advice for claimants during the claims process if the small claims limit for personal injury is raised. It also recognises concerns that the processes and costs in lower value cases are often disproportionate. So in addition to considering the limits, the Government is working with stakeholders to find ways to make the claims process more timely, proportionate and cost-effective.

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<sup>9</sup> CM6754

‘This work is in progress, and is being informed by information and representations from a range of different sources. The Select Committee’s report has itself generated a number of further representations from interested individuals and organisations. The Government will consult on the proposals which emerge.

‘In seeking to build on the country’s reputation as being a leader in the field of small claims litigation, the Government is considering a number of other options to enhance the process and accessibility to small claims litigation. In particular we are exploring ways to use new technology e.g. a web based system for navigating through the small claims process and the production of a DVD. These would provide an alternative for ‘leaflet shy’ litigants and a means of broadening the scope of providing information in a modern and acceptable format. These initiatives are in the very early stages of consideration and progress will be dictated by feasibility and funding.’

In July 2007 the Government published its response to the consultation ‘*Case Track limits and the claims process for personal injury claims*’<sup>10</sup>. With regard to increasing the small claims track limits the Government summarised its response as follows:-

- The majority of respondents agreed that the small claims limit for personal injury claims should remain at £1000.
- A very large majority of respondents agreed that the small claims limit for housing disrepair claims should also remain at the same level.
- An overwhelming majority of respondents agreed that the small claims limit for general claims should remain at £5000.

### **The Civil Justice Council**

In 2005, after extensive investigation, research and stakeholder consultation, the Civil Justice Council concluded as follows:

‘There is no evidence to suggest that the resolution of personal injury claims between £1,000 – £5,000 is working unsatisfactorily for the consumer. Only a very small number of such claims to not settle and litigation to trial in these cases is a very infrequent last resort. Provided that proportionality of costs is ensured, as has already been achieved in RTA claims below £10,000, there is simply no benefit to be gained by raising the small claims limit in personal injury cases. Rather, any such move that would remove costs recovery in such cases would work contrary to the public interest by removing quality controlled and regulated law firms from their role in resolving such claims which are still important to the injured consumer. The resulting gap in access to justice would be filled either by unrepresented consumers who would be unequal to the task of taking on the complexities of personal injury law and procedure, or by non lawyers whose only means of remuneration

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would be to deduct a contingency fee from the injured consumer's damages.'<sup>11</sup>

## Conclusion

The problem with allocation of cases to any of the tracks is that the only criterion currently widely used is value. Value is a very blunt instrument in identifying whether cases are straightforward or not. Cases of low value but high complexity may end up in the small claims track, with the claimant struggling to represent complex issues without assistance, and a simple case of higher value may end up in the fast track, where the claimant can recover legal costs and therefore get assistance. Some combination of value and complexity as criteria may be more helpful.

Since the Government published its Case Track Limits consultation response it has been working with major stakeholders to introduce a new streamlined process for road traffic personal injury claims with a value up to £10,000 where liability is admitted and which will entail fixed costs (see 6.3 below). These discussions have been successfully concluded. At the time of writing this response the proposed industry agreement is subject to Ministerial approval. The process proved that despite differences of opinion, major stakeholders in the process can work together to improve the claims process by significantly reducing the total costs liability of defendants and their insurers without reducing the small claims track limits and thereby protecting access to justice for many thousands of consumers.

As legal costs are not recoverable on the small claims track, claimants tend to represent themselves. It is therefore important that the small claims track is aimed at only the smaller, simpler cases which are manageable by an unrepresented claimant. If the small claims limit is increased, more litigants in person will represent themselves, which will overload the already under resourced civil courts. They will not be able to cope with the increase in court waiting and hearing timings which are invariably increased when litigants in person are involved in cases.

We therefore consider that this proposal should be abandoned.

## 6.2 Should there be one way costs shifting for personal injury claims?

The Law Society is strongly opposed to any proposal to introduce one way costs shifting for personal injury claims. The deterrent effect on a claimant of the risk of paying the defendant's costs is too easily brushed aside (whether as a result of losing on liability or failing to beat a Part 36 Offer). That deterrent works in an additional way in the case of CFAs. The insurers who end up paying Defendant's costs may be less inclined to trust the judgment of the claimant's solicitor, particularly if this happens regularly.

Businesses facing public liability claims, often themselves SMEs, normally have large excesses on their insurance, and commonly the excess is so large that the business is effectively self insuring for all but the most catastrophic of claims. The inability to recover

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11 *'Improved Access to Justice – Funding Options and Proportionate Costs'*.

costs in respect of claims which are quite often discontinued or lost by the Claimant at trial, would force Defendants into making undeserved settlements with the Claimants. An example is the holiday/travel industry. Case authorities such as *Wilson v Best Travel Ltd* [1993] 1AER353, *Hone v Going Places* [2001] EWCA Civ 947, *Evans v Kosmar Villa Holidays* [2007] EWCA Civ 1003 , and *Drabble v Sunstar Leisure* [2008] EWCA Civ 1062 , demonstrate that these cases raise difficult issues which are commonly resolved in favour of Defendants. The industry, which operates on low profit margins, could not afford to fight appropriate cases if it had to fund its own costs even when successful. The additional costs of settlement would inevitably increase the price of travel and holidays for consumers.

### **6.3 Can the transaction costs of personal injuries compensation be reduced?**

Significant work has already been undertaken by claimant and defendant stakeholders to achieve a reduction in transactional costs.

Up to 80 per cent of personal injury claims in England and Wales arise out of road traffic accidents. Over the last 12 months the Ministry of Justice, assisted by the Civil Justice Council, has conducted negotiations with stakeholders to introduce a new three stage streamlined process for RTA claims with an injury value of £10,000 or less where fixed costs are payable when liability is admitted (which happens in the vast majority of these claims). It is estimated that this streamlined procedure will account for approximately 75 per cent of all personal injury litigation when introduced in April 2010.

The Law Society is disappointed to note that Jackson LJ has chosen not to adopt the new streamlined claims process as a way forward but suggests that any streamlined procedure should be subject to further reform when his review has been concluded. This ignores the great deal of time spent by stakeholders, the MoJ and the CJC on negotiations which concluded with an industry wide agreement on both procedure and costs. More importantly, it ignores the fact that the majority of personal injury claims will fall within the new process.

To reopen the issue before the process has been tried and tested would be wrong and the Society believes that it is also too early to form a view as to whether or not a similar procedure should be adopted for employer and public liability claims. The existing scheme should be allowed to bed down so that it can be properly considered for employer and public liability claims.

## **7 Some specific types of litigation**

In this section we deal with the specialist jurisdictions where the Society has special knowledge and expertise.

### **7.1 The Mercantile Courts, small business disputes and intellectual property litigation involving SMEs (Chapter 29)**

#### **Intellectual property cases**

##### **Introduction**

This section deals simply with Intellectual Property and the comments have been provided by the Law Society's Intellectual Property Working Party (IPWP) which consists of solicitors who specialise in such matters. The views expressed and comments made are in respect of intellectual property dispute resolution (IPDR) matters only and where



views differ to those expressed elsewhere in this response they should be taken as relevant to IPDR matters only.

It is generally recognised that the courts of the United Kingdom, with the benefit of specialist judges, offer a high quality forum for dispute resolution in IP cases. However the costs of litigation are such that parties frequently perceive London as too expensive as a forum for dispute resolution and will take cases to other jurisdictions. It is outside the scope of this paper to engage in any form of comparative analysis of the costs of different countries. However it is recognised that the advantage of a specialist bench will be enhanced if litigants in IP matters are exposed to costs which are both predictable and proportionate.

### **Active case management**

When the Woolf reforms were first implemented it was anticipated that there would be active case management. However, as has been suggested elsewhere, practitioners consider that the courts have retrenched generally from active case management at an early stage. All too often the parties will agree directions by consent or variations to the time table by consent, but leaving the more thorny issues unresolved for another day. If the court was actively engaged in case management, the parties would be forced to plead out the case properly early on, the scope of disclosure will be agreed together with regimes to limit e-disclosure and tight time tables that would be manageable.

Typically at present, case management is conducted by masters and by the judge himself in the Patent County Court (practice direction paragraph 4.2). Although solicitors are obliged to take whatever steps they can to identify and narrow issues, the present procedure for case management which applies to all cases irrespective of their value or complexity, does not encourage the parties to actively identify and narrow issues at an early stage in the proceedings. In some cases, case management occurs too early in the proceedings. Although the parties have exchanged pleadings, they may not have identified those issues which require more or less effort because they have not attended to disclosure and lay or expert evidence. More active judge-led case management in which preliminary indications on strengths and weaknesses of particular issues may be expressed will encourage the parties to identify and narrow their issues. Also the judge responsible for active case management will have a better understanding of the case at the time of trial, assuming that the judge responsible for active case management will also be the trial judge. At present, the parties are encouraged to come to some agreement about the directions where if possible in order to help the Court to further the overriding objective. Parties who do so will be rewarded in costs. Parties who are combative are liable to be penalised in costs, whether or not their case succeeds at trial (2F-37 note to part 63.7). Arguably arrangement between parties without the involvement of the court does not encourage narrowing of issues.

Critical to this is ensuring the appointment of either a trial judge early on or a deputy judge or recorder to deal with case management issues. There is a perceived disparity between the approach adopted by some masters and that of the Patent Court judges. Active case management would ensure the court has greater visibility of the conduct of cases by parties and can penalise if appropriate to deter delay.

The process of setting up a case management conference (CMC) is often delayed because of administrative shortcomings in the listing office, or because a defendant fails

to file a copy of its defence which is the trigger for the court fixing a CMC. It would be better for a CMC to be listed automatically by the court after a set period.

Having regard to the public importance of IP, litigants derive great benefit from having specialist judges both in the Patent Court and the Patent County Court. Part 63.4a paragraph 2 of the Civil Procedure Rules provides that where a matter is urgent and it is not practical or appropriate for the patents judge to deal with it, the matter may be dealt with by another judge with appropriate specialist experience. However, recorders are rarely appointed to assist with the workload in Patent County Court, which also does not have the benefit of a district judge. The appointment of a specialist district judge and greater use of recorders in the Patent County Court, coupled with the allocation of certain cases to either small claims or fast-track will facilitate more economic disposal of smaller cases.

## **Allocation**

At present all IP cases are designated automatically as multi-track. Consequentially certain parts of CPR Part 29 (case management) are omitted from the management of patent and other IP cases by CPR Part 63.7. However some cases are suitable for disposal under either the small claims or the fast-track procedure. Moreover, even in the multi-track, some cases will benefit from streamlined procedures as discussed later. There can be a tension between the court's demand for costs reduction while insisting on Rolls Royce preparation.

There is a streamline procedure for use in patent cases which excludes disclosure and oral testimony. Greater use could be made of this.

The Intellectual Property Court Users Committee has recently published a consultation for the reform of the Patent County Court proposing procedural changes as follows:-

- a) to require parties primarily to present their cases by sequential acknowledgement;
- b) to impose robust case management;
- c) to permit or require disclosure, experiments, factual evidence, expert evidence and cross-examination only where a cost benefit test is satisfied;
- d) to limit trials to one or two days at the most;
- e) the Patent County Court should be clearly differentiated from the High Court.

## **Part 36**

The Part 36 regime should be reviewed as the effectiveness of making an offer which is not accepted is being undermined by reluctance to enforce existing rules on awards in wasted costs on an indemnity basis and/or awarding interest above the court rate of interest. Recent cases have suggested that the judges are reluctant to hold parties to account for failing to accept better or equivalent terms at an early stage of proceedings.

There is also uncertainty as to how IP cases fit within the regime where injunctive relief or delivery up of an infringing product may be an important part of the claim.

### **Narrowing of issues**

At present the Patent Court Guide requires the patentee to identify which of the claims of its patent are contended to have independent validity and which of those claims is said to be infringed and we should communicate a list of those claims to the other parties. Although there is a direction that the position should be kept under review, there is little other comment regarding narrowing of issues.

Some members of the IPWP have had experience of a '*Markman*' hearing or claim a construction hearing in the US. Such hearings held before a judge with evidence facilitate the determination of patent infringement cases by the interpretation of claims. The streamline procedure anticipated by the Patent Court Guide is a similar procedure but members of the IPWP consider that there is insufficient use of the procedure.

### **Preliminary indications**

More active case management will give the court even more information regarding the issues between parties. Accordingly, it may be in a position to give a preliminary indication.

If the court gives preliminary indications on the likely outcome of particular issues or even the entire subject matter of a case, parties will have an option as to whether or not to proceed notwithstanding that indication. In the event that the party proceeds and is unsuccessful, it is anticipated that there will be severe cost consequences

### **ADR**

We agree that there should be greater encouragement of parties to engage in ADR and believe that this could be reflected in the costs.

### **Detailed assessment**

There should be greater use of Summary Assessment of Costs at preliminary stages.

There should also be greater use of crediting parties for attempts to settle cases.

### **Groundless threats**

The IPWP proposes the abolition of groundless threats. The principal reason for this suggestion is that the substantive law of groundless threats inhibits the parties from writing pre-action letters which would in other areas be the norm and assist in identifying issues early. For this reason, we consider that the present law of groundless threats encourages litigation because parties issue proceedings rather than run a risk of an allegation of making groundless threats. Indeed students on the Diploma of Intellectual Property Course are taught that this is the correct approach to initiation of new claims.

## Alternative procedures

### a) Paper-based decisions

We are aware that in many European jurisdictions and patent offices, adjudications are made on paper-based submissions. We consider that the parties will welcome the resolution of certain disputes whereby each side makes paper submissions supported by witness statements, if appropriate, and agrees to accept the adjudication. Such a procedure would be suitable for both low-value and straightforward cases.

### b) Judicial mediation

We are also aware that in some jurisdictions the judiciary itself will exercise the role of mediator in suitable cases and with the consent of the parties. If our suggestions regarding raised judicial involvement and case management conferences are adopted, we can foresee circumstances in which that judge would be ideally suited to be the mediator of the dispute. In the event that mediation is not possible, it is recognised that consequentially the judge/mediator would not be suitable to be the trial judge. However, we see an advantage of the role of the judicial mediator in that it will help parties overcome their natural suspicion of one another and the extension of the role to mediator is consistent with our views that the judiciary should also be capable of giving preliminary indications on prospects of success or determination of paper-based submissions so that judges see cases as their own and they will take a more active part in the resolution of 'their' cases.

## 7.2 Housing claims

The Law Society's Housing Law Committee welcomes and appreciates the depth of Jackson LJ's review of costs across the whole of the housing sector in chapter 31 of his preliminary report.

The Society agrees with Jackson LJ's view (paragraph 1.5) that, to a great extent, the principle of simplification of the rental market across the social housing sector by adoption of a limited number of different types of tenancy agreements, as recommended by the Law Commission several years ago, would assist tenants and landlords alike, as well as the judiciary. Any decrease in the different types of statutory regimes would also have a positive impact on the efficiency and speed with which cases are dealt with by the courts once issued, as well as an impact on costs.

There has been a noticeable and substantial increase in ECHR Article 8 claims within the last year following on from the House of Lords judgment in *Doherty v Birmingham City Council*<sup>12</sup>, and this is an area of developing contentious law. Jackson LJ's recommendation that costs may be reduced by amending the Rent Arrears Pre-Action Protocol is a valuable one and will be considered in depth by the Society in its response to the CJC's consultation later this year (see section 8.4.3 below). However, any amendment will not have an impact on the recent increase in possession cases where valid termination of tenancy is in issue and arrears of rent are not in issue, where similar public law defences are being raised at considerable cost to public funding.

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12 *Birmingham City Council v Doherty* [2008] UKHL Civ 57

The Society also anticipates an increase in the number of judicial review cases following the recent decision in *London & Quadrant v Weaver*<sup>43</sup>, subject to the outcome of the application for permission to appeal to the House of Lords in that case. It is inevitable that litigation will be commenced in areas where housing law is unclear, and where public funding is available to assist in its clarification.

### 7.3 Large commercial claims

The Law Society believes that the work of the Long Trials Working Party (LTWP) is to be commended and has been invaluable for the purposes of the Commercial Court pilot. It may be that lessons can be learned from that good work which could be applied to other types of claims. This should be considered after the success or otherwise of the Commercial Court pilot has been considered in detail.

### 7.4 Chancery litigation

The comments in this section have been provided by the Law Society's Wills and Equity Committee. The views expressed and comments made are in respect of Chancery matters only and where views differ to those expressed elsewhere in this response they should be taken as relevant to Chancery matters only.

#### **Should the Cost Neutral regime (whereby costs come out of the fund or the estate, rather than the pocket of the losing party) be extended?**

Jackson LJ refers in his paper to the beneficial effect which a Cost Neutral Order has had upon parties to Ancillary Relief claims in the Family Division. However, in the case of probate and trust disputes, the Law Society considers that Cost Neutral Orders can act as an incentive to those keen to litigate. In the case of matrimonial litigation there are two parties with an equal claim to a pot and therefore suffer equally from a Cost Neutral Order. In trust and probate litigation there are any number of beneficiaries plus executors/trustees; not all beneficiaries have equal interests in the trust/estate. Inevitably some benefit more than others from a Cost Neutral decision. In our view, parties to trust and probate litigation should be aware of the costs risks at an early stage rather than work on the assumption that the costs will be met out of a central pot in which they may have a limited or entirely speculative interest. An early understanding that the usual rule in costs under CPR 44.3 might apply in appropriate circumstances could encourage settlement and discourage what can amount in practice to vexatious/nuisance claims where unmeritorious settlements can be secured on the back of a one way costs risk.

The Society also considers that judges could pay greater attention to the costs impact of litigation on the fund. Many practitioners are concerned that too many parties who have behaved unreasonably obtain their costs out of the fund. If parties thought that they were at risk as to costs at an early stage they might give greater thought to earlier settlement and there would be a reduction in speculative claims conducted on the basis that the fund would pick up the bill.

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13 R (Weaver) v London & Quadrant Housing Trust (Equality & Human Rights Commission intervening) [2009] EWCA Civ 587; [2009] WLR (D) 202

Finally, costs are rarely assessed in large scale chancery litigation where there can be a multiplicity of parties represented. If trustees/executors were required to insist upon assessment of costs considered unreasonable, costs might be pitched at more reasonable levels.

**Are there any circumstances in which the costs of the *Beddoe* application might properly be saved by judicious amendment of the rules?**

It would be helpful to distinguish between a *Beddoe* application (i.e. where trustees seek a Court order that they be indemnified out of the trust fund for taking steps in litigation not otherwise covered by the trustee's right to indemnity under the general law) and executor/trustee applications under CPR 64.2 for other relief, eg: directions as to the administration of the estate/trust generally.

So far as securing *Beddoe* relief is concerned, there is little alternative for executors/trustees if they find themselves involved in litigation. In those circumstances they ought to have access to the fund to finance legal advice and should be entitled to a court order to protect themselves from subsequent criticism for embarking on litigation to the detriment of the estate/trust fund. Some control over costs to be incurred could be imposed by the Master at the CMC if thought appropriate.

So far as an application for directions under CPR 64 there needs to be a distinction between lay trustees who find themselves looking to the court for directions when confronting a difficult decision, and professional trustees who charge fees and have PI insurance. The services of professional trustees are secured by settlors on the basis that they will manage a trust professionally and be able to take difficult decisions based on professional and/or legal advice where appropriate. There are occasions in the experience of all practitioners where it was felt that professional trustees had sought the comfort of a Court Order at the expense of the trust fund where a more robust approach would have saved the fund money and where in reality there was little risk in the proposed course of action.

It is difficult to see how the rules themselves could be amended to address all these issues; judicial discretion would have to be exercised.

**Should *Agassi* be reversed?**

The Society can see arguments why *Agassi* should be reversed, i.e.: that it ought to be possible for a party to recover non-legal costs from the other side in litigation eg: the costs of a tax advisor. However, there are two concerns here. First, it would need to be very clear that such advisers do not have a right to conduct litigation and do not owe duties the court. Any work in respect of litigation must remain the preserve of qualified litigators. Secondly, a consequence of instructions coming from non-solicitors relates to privilege. Communications between clients and tax advisors are not privileged. Tax advisors can be ignorant of the issue of privileged and non-privileged communications. This will remain a major issue for clients.

### **Could *Beddoe* applications be made on paper?**

Paper applications for simple *Beddoe* relief would be a sensible and proportionate use of the court's time. This is provided for under CPR 64.2.3. Equally, some non-*Beddoe* type applications under CPR 64 can be made on paper. Provision is made for this under the existing CPR 64 (CPR 64BPD.6)

### **Should there be a limitation on the amount of costs which can come out of the trust fund or estate?**

The Society agrees that there should be a limitation on the amount of costs which can come out of a trust fund or estate. However, it will be difficult to devise a direction which would apply to every case. The decision will be best left to the discretion of the master/judge at a CMC. However if it were more widely recognised that a costs cap order is available to the master/judge at the CMC and this were exercised, this might prove a more attractive option.

### **Should there be a 'Chancery fast track'?**

Yes, in principle. It could be used for some of the simpler *Beddoe* actions mentioned above or as an alternative. As with most areas of law, however, there is no correlation between complexity of the legal and evidential issues and underlying value of the estate. So fast track could only be used cautiously for those disputes which are of lower value and where the legal and evidential issues are also reasonably straightforward. Some low value 1975 Act claims for maintenance out of the estate would benefit from a fast track. Trust disputes are unlikely to lend themselves to fast track resolution because of the nature of the issues.

### **Mediation and its role**

Chancery claims are often complex and involve several parties. Remedies sought are not necessarily purely financial and can include a mixture of contractual, property and equitable claims; frequently the most heated debate in probate litigation, and sometimes even the key to resolution, is the dispute over chattels. Mediation can be an ideal forum in which to resolve multi-faceted disputes and it could be directed at the CMC. A procedure similar to the FDR in the Family Division was thought entirely appropriate for 1975 Act claims where the presence of parties with their legal advisors before an independent judge could have the effect of 'knocking heads' together in a way that has proved successful in the Family Division.

Difficulties may arise where there are beneficiaries who are minors so, whatever the result, a court order is needed at which minors' interests would need to be represented. However, we consider that mediation could bring parties together and that the subsequent costs of securing approval for a compromise achieved at mediation was small next to the costs of a full-blown trial.

Mediation is an area where a Cost Neutral approach is clearly appropriate. If, in the case of an entrenched family probate or trust dispute, it was expressly agreed that the mediation costs of all the parties would come out of the trust fund or estate, this could be a useful device to facilitate a settlement. The costs would be ring fenced and time

limited and everybody would have an equal stake in securing a successful outcome out of the mediation. Some parties economise in mediations and do not instruct counsel – costs coming out of a central fund would ensure that parties were properly and fully advised on settlement and agreements could be drawn up at the end of the day by counsel. A direction to the effect that the costs of a mediation should come out of the fund could be made at the CMC.

### **Mediation as a stalling tactic**

There have been cases where mediation is used tactically where there is no real intention to mediate, merely an intention to delay and run up costs for the poorer party in the hope of securing a better settlement. In those circumstances the suggestion that the costs of mediation should come out of the central fund has the effect of flushing out whether or not the opponent is serious about mediation. In any costs debate after trial, the judge should be aware that a proposal to mediate can be used tactically.

### **The mediation window**

This should be after all witness statements have been exchanged/relevant documents disclosed in Part 8 claims. A 28/42 day window can be directed. Failure to respond constructively to dates/mediators should impact on costs.

## **7.5 Technology and construction litigation**

The Law Society supports the use of specialist judges and docketing in the TCC and believes it should be followed in all courts.

The Law Society does not support the suggestion that fixed costs should apply in TCC claims. It is likely that such costs would cause difficulty in claims which are technically complex and which require a high degree of specialism.

## **7.6 Defamation proceedings**

### **Introduction**

Many of the points raised above apply to defamation equally. It is important to bear in mind that libel actions are brought against the range of businesses and individuals and not just against media organisations. Given their disproportionate voice it is important not to attach unnecessary emphasis to the arguments put forward by media defendants if this is at the expense of other defendants.

The Law Society has put forward a substantive response in relation to the Ministry of Justice ('MOJ') consultation on costs in publication proceedings. A copy of our response is attached for information.

In relation to the four proposals put forward, the Law Society's view is that:

- a) Any limit placed on recoverable hourly rates should reflect the guideline hourly rates applied to every other form of litigation.



- b) Mandatory cost caps could well lead to an increase in the overall costs of proceedings and to unnecessary satellite litigation.
- c) The issue of linking the recoverability of the premium for ATE insurance with notification to the other party is not a matter that is of relevance only to defamation proceedings.
- d) The concerns about proportionality apply particularly to defamation since a claimant is often not simply seeking financial compensation but is seeking vindication and/or an apology and/or an order that will prevent the defendant from republishing the statements complained of. These factors should all be taken into consideration in considering whether or not the costs are proportionate.

### **The nature of publication proceedings and factors affecting costs**

The defamation practice of providing statements of case seems to us to be beneficial because it enables the issues to be defined as clearly as possible from the outset and so is likely to reduce costs. We agree with the anecdotal evidence supplied to Jackson LJ that this appears to be being achieved in defamation through a combination of case management by the courts and practitioners. We note that there is no evidence to support the suggestion that amendments to statements of case are more prevalent in publication proceedings than in other proceedings. The Reply to the defence would appear to serve a useful purpose in identifying which matters of fact the claimant accepts are true and which are disputed. It may be the case that a Reply in other forms of litigation would be of assistance to the parties and the court and would, in the long term, save costs.

Interim applications can be of enormous assistance either in resolving cases at an early stage, identifying the issues clearly (with the possibility of substantial future savings in costs) or in providing the parties with an indication of the views of the court which in itself can assist the parties in resolving disputes.

The preliminary report refers to 'aggressive' litigating in publication proceedings. It is not clear what is meant by 'aggressive' litigating as opposed to other forms of litigating nor how this manifests itself or what the consequences are. Some cases will be run more aggressively than others in all forms of litigation. It is not clear that this is a particular problem in defamation. Again, one way to manage such litigation (if there is any difficulty) is for there to be active case management and for judges to identify (and where appropriate penalise) such conduct.

Reference is also made to criticisms made by Mr Paul Dacre, the Editor in Chief of the Daily Mail in a speech in November 2008. That speech was made by the editor of a national newspaper to other editors and clearly represented the opinions of Mr Dacre without necessarily reflecting the underlying realities. It is plain that claimant and defendant firms blame each other for increasing the costs of publication proceedings. That is unsurprising and clearly a neutral evaluation of the factual evidence is the appropriate way to establish the true position. We would urge this to take place before further action is taken.

## **Statistical information concerning defamation proceedings and publication claims**

It is correct that the majority of defamation claims are commenced in the Royal Courts of Justice. However, claims are pursued in the District Registry and the figures for the Royal Courts of Justice alone do not represent the position nationally.

In relation to the data provided by the MLA, it is not clear what assistance this can provide to Jackson LJ. The data does not contain any explanation as to (i) the nature of the publications concerned, (ii) whether apologies and/or undertakings were provided, (iii) the stage at which the claims were resolved, (iv) why the claims were defended up to the point where settlement was achieved or, (v) any information which enables a true view to be formed as to whether or not the costs were reasonable. Equally, we are not told whether the costs paid have been challenged and/or assessed. No figures appear to have been provided as to the number of cases which are successfully defended or the occasions when successful claimants have to pay the defendants' costs and their own costs. In addition, many newspaper groups and broadcasters have in-house solicitors or barristers to provide advice and it is not clear that the cost of such advice is included in the defendants' costs figures provided.

Overall, there is no basis upon which any substantive conclusions can be drawn from this material as to whether the costs are proportionate (for example, there is no indication of the seriousness of the allegations or the extent of any apologies provided). Some claimants in publication proceedings are prepared to accept very significant reductions in the damages sought in return for substantive and prominent apologies. Whilst the figures provided could be used to support the proposition that claimant firms are incurring unreasonable and disproportionately high costs, they could equally be used to support an argument that defendants in publication proceedings are defending a large number of unmeritorious claims thus putting claimants to significant inconvenience and cost in pursuing actions which ultimately defendants accept need to be settled or which defendants are losing at trial. It is notable that on the face of the information provided none of the organisations who provided data successfully defended a claim during 2008. A further factor in examining the differences in costs is the possibility that defendants are negotiating very good rates with defendant firms and/or are using in-house counsel.

Subject to the substantial reservations that we have expressed above in relation to the assistance that can be obtained from the statistics provided by the MLA, there should, in theory, be no reason why the claimant's costs should consistently be a multiple of the defendant's costs. Having said that, the information provided does not enable any assessment to be made as to the potential reasons for this. As we have said in our response to the MOJ consultation, case management and robust assessment should provide substantive tools with which to challenge excessive costs where such costs have been incurred by claimants. If those mechanisms are failing then it would appear that what is needed is a review of those mechanisms and to ensure that they operate properly rather than the introduction of separate mechanisms and/or separate rules for publication proceedings.

## Comparison with overseas defamation costs

We would make a number of points in relation to the University of Oxford's Centre of Socio-Legal Studies Report ('The Oxford Study').

The Oxford Study suggests that CFAs impose a restraint on media outlets irrespective of journalistic standards. That seems to us to be a remarkable proposition in circumstances where if what has been published is true (and can be proved to be true on the balance of probabilities) there is a complete defence to any claim. As we have stated in the MOJ Consultation, defendants in publication proceedings have a wide range of defences available to them. It is only if all of those defences fail that they face themselves with the risk of incurring a liability for a claimant's costs.

The Oxford Study makes it clear that some of the factors (which are not identified in the report) which allegedly lead to costs in publication proceedings being higher in England and Wales than in other jurisdictions are a result of characteristics unique to the common law tradition. In other words, the costs issues that the Oxford Study raises may well be true in all forms of litigation and not unique to publication proceedings.

We note that the Oxford Study accepted that the CFA scheme increased access to justice for litigants.

In paragraph 4.1.1, the Oxford Study refers to the particular case of *Martin Jones v Associated Newspapers Limited*. The study does not explain why that case was defended, what stage it was defended to, whether the costs were assessed, what the outcome of the case was, what the defendants' costs were or whether any offers were made (and if so when and at what level). In the circumstances, it is impossible to establish whether or not this case is useful as an indicator of a typical publication action.

Paragraph 4.1.1 of the Oxford Study also refers to the *Campbell v MGN* case. Again, no analysis is made of the reasons why Mirror Group Newspapers defended the case. It is, to a great extent, unsurprising that costs were significant in an action that was fought all the way through to the House of Lords. The Oxford Study makes no reference to the extent to which the defendants in that action were aware of the extent of their potential costs liability in the event that the proceedings were defended unsuccessfully. The study also fails to refer to the fact that a clear finding was made that the defendants had infringed the claimant's Article 8 rights (whilst at the same time referring to the interference with the defendants' Article 10 rights). The Oxford Study suggests that in the cases referred to in paragraph 4.1.1, the media outlets had a financial disincentive to defend themselves which conflicted with their right to freedom of expression. An alternative view is that the media outlets had infringed the rights of other individuals and had sought to defend claims brought by those individuals in circumstances where the courts were of the view that there was no sustainable defence to those claims.

The Oxford Study suggests that litigation costs and CFA success fees provide an obvious incentive for the defendant to make attempts to settle actions by offering compensation irrespective of whether or not they have a good defence. It is notable that in the cases referred to, the claimants plainly did not have a good defence. Commercial issues such as costs are a factor in all forms of dispute resolution and affect the way that parties approach resolving all disputes. They can be relevant from small RTA cases to very substantial commercial litigation. The cases relied upon by the study would suggest that, on the contrary, media organisations are very prepared to spend very

significant sums of money defending cases where ultimately it is established that there is no sustainable defence whilst being fully aware of the potential consequences of doing so. None of the examples are of cases where there was a good defence to an action but the action was compromised by the payment of compensation and costs.

The Oxford Study contains two scenarios. These are said to be based on actual cases. No explanation is provided as to the reasons why the cases were fought. The Oxford Study does not consider what benefit there is to the right to freedom of expression through the publication of untrue allegations. The scenarios do not set out any of the evidence that was available to the parties. In relation to scenario 1 this appears to be a finely balanced case where there was a substantial prospect of the defendant losing. There is little reference to the nature and extent of any settlement negotiations or the timing of those negotiations and the level of any offers that were made. It is not clear that the defendants were made aware of the claimants' funding regime. It is clear that the defendants in the action rejected what was subsequently held to be a sensible early offer of settlement.

In the circumstances it is unsurprising that when the defendants' case was brought to trial and they lost, the defendants found themselves in a very poor position when it came to arguing on costs. This is reflected in the fact that the costs order was made on an indemnity basis (which would undoubtedly have very significantly increased the level of the recoverable costs). It is also notable that the success fee increased dramatically when the matter was taken to trial. On the face of the information provided in a relatively finely balanced case, it would appear that 100 per cent uplift may well have been justifiable. Therefore, once the uplift and insurance premium are taken into account, the claimant's base costs in scenario 1 appear to be in the region of £210,000. The difference between those base costs and the defendants' base costs are likely to reflect the different hourly rates that defendant firms and claimant firms charge. Again, this is true across a huge range of litigation.

We appreciate that there are a number of arguments surrounding why there should be a difference between defendant firms' hourly rates and claimant firms' hourly rates. It is clear that the one of the factors that can influence this are the very different business models adopted by the two sides of the profession. The scenario does not provide any indication as to the nature or extent of the work that needed to be undertaken by the claimants' solicitors. No indication is provided as to whether any challenge was made to the costs or whether those costs were assessed (and if so, the extent to which they were reduced). We would again make the point that if the costs were truly unreasonable and/or disproportionate and yet were not substantially reduced (albeit that we note that this was an order for indemnity costs), then this would appear to be a failing in the system for the review and assessment of costs rather than a failing that is attributable to CFAs in publication proceedings.

In relation to scenario 2 in the Oxford Study there is no information to enable the reasons for the matter proceeding to trial to be identified. No explanation is provided as to the defences that were relied upon. The Oxford Study does not say how many witnesses were involved or whether there were any experts. It is clear that this was a very substantial trial which lasted for three weeks. On the basis of the information provided in the scenario, it is simply not possible to say whether a 100 per cent success fee was reasonable and the fact that the claimant lost suggests that it was a high risk case. The insurance premium charged is plainly very substantial but no details are provided as to the nature and extent of the cover provided; nor are we told when the

premium became payable. With hindsight it was clearly a wise decision to obtain cover and we assume that insurers made a very substantial payment to the benefit of the successful defendants, which were very substantial. No indication is provided as to whether the figures contained in the study are base costs or whether they include an uplift. If they are inclusive then the base costs would appear to be £1.3M. We believe this scenario is based on the *Miller v Associated Newspapers* case in 2005. That was plainly a unique case contested between two well funded parties who appear to have both taken an approach which was entirely disproportionate to the value of the claim.

In relation to the various jurisdictions' approach to costs, it is notable that on page 56 of the study a substantial factor in the overall costs is the hourly rate applied. As we have indicated before, there may be underlying reasons why claimant firms charge higher hourly rates than defendant firms. It is also notable that for the UK jurisdiction (and this may be the case in the other jurisdictions), the study is based on estimates from only one firm within the jurisdiction. No explanation is provided as to how the firms were selected and whether the firm regularly represent claimants and/or defendants.

Against this background, in our view the Oxford Study provides no substantive basis for any changes to the current regime in England and Wales.

We note the suggestion that in Ireland costs in defamation actions are lower than in England and Wales. We would be surprised if that is the case. Again, this may simply reflect the inherent difficulty in seeking to provide estimates for costs in relation to the scenarios contained. We also note that in a recent libel action in Ireland an award of €1.8M was made by the jury and it may well be the fact that costs are substantial in Ireland but are regarded as being more proportionate given the much higher level of award. This may well provide a reason for our experience that defendants would very much rather be appearing in the English courts than in Ireland. In this respect we note that the very substantial involvement of counsel in Ireland contributes to very substantial costs being incurred even at a very early stage in proceedings.

### **Non-media defamation proceedings**

No explanation is provided as to why media defamation proceedings and non-media defamation proceedings should be treated differently to each other. We anticipate that any distinction should be based on the value of the claim and not on what would otherwise appear to be an artificial distinction.

A suggestion has been made that it would be appropriate for more use to be made of the possibility of dealing with actions in the County Court. On the face of it this would appear unattractive. There is much to be said for specialist cases being dealt with by specialist judges. Many solicitors have experience of non-specialist judges dealing with specialist cases in the circumstances where this leads to additional costs being incurred. It is not clear to us that County Court judges would be comfortable to try such actions and we assume that the proposal is that this would be done without a jury. Again, this would involve substantive changes to the law as it stands.

## **Overview of submissions**

There is an understandable frustration that CFAs are attractive to those who have sufficient funds to pursue a claim in any event. This is not unique to actions for defamation (although it may well be the case that by the very nature of a claim for defamation those seeking to pursue claims are often high profile figures who do have sufficient funds available to them to pursue a claim in any event). In any event, however, we do not believe that an individual's means should compel them to follow one particular funding mechanism. If claimants perceive that it is in their interests to use a CFA, then they should be entitled to do so and it is easy to see why it is attractive to them.

We agree that one solution to high costs could be more forceful application of the current rules.

We think there is no basis for the suggestion that a different cost regime should apply in cases involving a breach of article 10 than to costs involving breach of any other convention rights. That is particularly the case in circumstances where there has been a breach of article 8 by the defendants.

We note that those making representations on both sides felt that active case management could provide a means for controlling costs. We agree.

## **Base costs**

Where the hourly rates claimed are above the appropriate guideline figures for summary assessment, the solution is for the paying party to challenge the rates in the expectation that the court will, on assessment, reduce the hourly rates claimed to rates within the guideline figures.

Equally, if there is duplication between solicitors and counsel in CFA cases, then this is a matter that should be dealt with on assessment. Unnecessarily or unreasonable duplication are not recoverable on an inter-partes basis.

## **Cost capping**

The arguments in respect to cost capping apply across all litigation and it is not appropriate to treat defamation as a special category.

There are no statistics comparing ultimate costs with the estimates provided by parties in allocation questionnaires. We anticipate that no matter how well intentioned or experienced the legal adviser is, there will be very substantial differences between the costs estimated at the beginning of the case and the ultimate costs. This simply reflects the fact that in litigation a case can evolve in a manner that is entirely unexpected or that time will need to be expended in dealing with issues that could not have been foreseen. In this respect we endorse the views of Mr Justice Eady in relation to the difficulties of cost capping in libel actions and indeed would consider that this would apply to almost any action.

Nonetheless, we consider that cost capping provides a useful tool for the courts in actively managing cases and could enable judges to be proactively involved in

monitoring costs and ensuring they are reasonable and proportionate. There could well be significant advantages to any cost capping exercise being undertaken by a judge with experience of dealing with costs in defamation proceedings. While there is a risk that cost capping could lead to involve additional costs in actions at an early stage and to satellite litigation, they are less likely in circumstances where the exercise is undertaken by a judge with relevant experience. This does not necessarily have to be a High Court judge where a master is available with sufficient expertise.

## **CFAs in defamation proceedings**

We agree that fixed stage success fees are sensible and our experience is that they are becoming more common.

In relation to ATE insurance premiums, our experience is that in defamation actions these are very substantial. We can see significant difficulties in capping the recoverability of premiums in circumstances where the premiums are determined on the open market by providers of ATE insurance.

We can see the attraction of a non-recoverability period for ATE insurance premiums. There is clearly a significant injustice to defendants who are faced with a liability for an ATE insurance premium before they have had time to consider a claim and respond to it. However, we agree that the introduction of a non-recoverable period could lead providers of ATE insurance to conclude that in circumstances where claims are not resolved within that period the defendant, at the very least, will have made an informed decision that the claim is defensible. There is every likelihood that this will weigh in the minds of insurance providers who will naturally consider that the risk of an adverse costs award is higher in such cases and will therefore seek to charge a higher premium. If that premium cannot be afforded by the claimant, access to justice will be reduced. If it can be afforded the potential liability of the defendant will increase.

## **Case management and miscellaneous**

Active case management can take many forms. For example, in an action for defamation it could involve there being a substantive case management conference at which the court paid careful scrutiny to the costs estimates provided by the parties, investigated the potential value of the claim, reviewed the seriousness of the allegations and the extent of their dissemination and considered the directions with the parties in the context of the costs which would be likely to be incurred as a consequence of the directions proposed. At the same time the court could consider whether the proposed costs were proportionate. It could also consider whether cost capping was an appropriate measure. The court could consider (and provide guidance) as to the level of fee earners it considered appropriate for the work (with the claimant retaining the option to instruct more (or more experienced) fee earners). The court could also seek to identify the issues in contention with a view to minimising the areas of dispute and limiting costs in this way. The court could also consider whether any applications would be appropriate to limit the issues (and therefore the costs) in the long term. If necessary the court could express a view as to the appropriate level of costs for each stage of the proceedings. The court could indicate, for example, that where a party's costs reached a certain level an application should be made for a further case management conference so that the court could consider whether further case management was appropriate.

This would fit in with the cost budgeting proposals already been put forward to Jackson LJ.

## **7.7 Collective actions**

The Law Society's existing policy on collective redress is as follows:

- i. The detriment to potential claimants caused by the lack of a collective redress procedure has not, as yet, been fully quantified.
- ii. In the absence of a proven need for a new collective redress procedure the introduction of any new system should be piloted.
- iii. Any new collective redress procedure should not be restricted to consumers and should be available in respect of both follow-on and stand alone actions.
- iv. In any collective redress system there should be a procedure allowing for claims to be resolved without recourse to litigation but which, nevertheless should be subject to court approval. This would prevent class actions being 'catapulted' into legal proceedings unnecessarily.
- v. It is unclear at the moment whether it is possible to recommend that collective redress actions should all be opt in or opt out until there has been a review of the way costs are dealt with in such actions.
- vi. The judiciary should adopt the role of 'gatekeeper'.
- vii. If the Civil Procedure Rules are reviewed, they should provide one procedural rule for all class actions. The rules should also include a class action pre-action protocol together with pre action settlement guidance and requirements.
- viii. The costs rules should be reviewed, in so far as they are applicable to collective redress actions, for the mutual protection of both claimants and defendants but without stifling access to justice.

The Society is at present reviewing its policy in the light of further evidence and research and the ongoing work in this area by the European Commission. Significant work is being undertaken by our European colleagues on this issue which may result in legislation.



## **8 Controlling the costs of litigation**

### **8.1 'E' disclosure**

Disclosure is a significant driver of costs. Jackson LJ comments on what is necessary for a 'reasonable search', and expresses justifiable concern at the expenditure incurred in such cases as *Digicel (St Lucia) Ltd v Cable and Wireless* [2005] and *Nichia Corporation v Argos Ltd* [2007]. What these cases appear to show is that commercial practice and the memory and storage capacity of day-to-day IT equipment is such that the amount of information potentially available in respect of any transaction is now so enormous as to be practically unmanageable.

If the litigation process is to remain cost-effective, there must be improved ways of dealing with the exponential growth in the availability of information. This will likely mean that the whole of the disclosure process will need to be reviewed. This will be a difficult issue as all options will need to be considered as well as the advantages and disadvantages of any changes.

### **8.2 Disclosure generally**

#### **Current rules and their operation in practice**

The Law Society recognises the partial form of disclosure which operates in small claims track litigation, and the relative effectiveness of it to that process. However, we consider that it needs to be remembered that the rules have changed significantly under the Woolf reforms and that disclosure is now a significantly less technical exercise than it used to be, even if the documents being disclosed are little different.

We note the point that Jackson LJ makes about the different extent of responsibility for disclosure in varying cases. We consider this point is well made and recognises that in English law there is already clear acceptance of the fact that different cases demand different levels of disclosure. Arguably the ordinary disclosure process can be too burdensome in lower value and/or less complex cases. However, there is always the risk that limited disclosure may mean that crucial documents are missed and the wrong result achieved.

Jackson LJ's own experience in the TCC which has docketed judges, and which has set a standard for effective CMCs appears to be further indication of the fact that despite the flexibility in the rules, the normal process is adhered to in the majority of actions. It is important therefore that the standard process is proportionate and cost-effective.

There are occasions when disclosure of documents has already taken place during the pre action protocol stages and then is repeated during the disclosure phase. Removing this duplication of work would undoubtedly result in costs savings.

## **Do the rules operate effectively?**

Jackson LJ appears to consider that the current disclosure rules work well in all significant areas of litigation apart from large multi track cases. Broadly, we accept this analysis, though some practitioners who deal with less complex litigation other than personal injuries have concerns over the expenditure incurred in disclosure and the preparation of witness statements. In more complex claims the introduction of witness statements has been a welcome improvement whereby issues are narrowed down ahead of trial and expert evidence can be properly prepared,

## **Perceived difficulties with current process**

The situation, as presented by Jackson LJ, is one with which the Law Society generally agrees so far as larger cases go. It is not clear to us that the problems identified raise significant problems in lower value cases. The practical reality of litigation is that some cases are based on a minimal number of key documents.

The Society agrees that a judicial docketing system is required.

## **Other approaches**

The IBA system offers a clear means to reduce cost. By ensuring that only core, crucial documents are collected, costs are reduced in all areas. There remains, however, the issue of ensuring that there is sufficient disclosure to ensure that justice is done. It may be possible to achieve this through agreement between the parties and, in any case, it would be essential that procedures provided for flexibility in the right cases.

It may be appropriate to see whether there is any learning from other jurisdictions as to how disclosure can be reduced in an adversarial system without compromising the interests of justice. This is an issue for further, discrete consultation.

## **Review**

The Law Society's responses to the specific points made by Jackson LJ are;

- There is much to be said for a culture of pre-issue disclosure to encouraged, so that the parties have an idea of the strength of their case at an early stage.
- Sanctions should not be readily adopted if the general basis of disclosure is streamlined. The introduction of sanctions is likely to lead to subsequent satellite litigation.
- We see the benefit of e-disclosure in the early stages of high value cases. It is therefore necessary to consider in each case if the circumstances warrant its use and this can be done by following the specific protocol already in place – i.e. the E-Disclosure Practice Direction. This should be sufficient if followed correctly.

- There are many options to reduce the myriad burdens created by trial bundles. We believe that effective IT in the courts is long overdue. Such investment would facilitate secure extranets for each case with the bundle available on line. This simple and affordable measure will dramatically reduce costs.

## **The options**

### **Option 1:**

We tend to agree that the difficulties arise over the interpretation of the rules and would resist any suggestion that there needs to be a radical change in the rules.

### **Option 2:**

The implementation of an approach similar to the IBA rules could be an effective system to reduce costs and one which the Law Society could support subject to further consultation and a full pilot.

### **Option 3:**

Whilst an issues based system may be an attractive option, the introduction of a system similar to that used by the IBA (option 2) would avoid the need for this.

### **Option 4:**

We do not support a return to the basis of discovery in the RSC.

### **Option 5:**

Changes, if they are to be made, which we question, should be introduced by changes to the rules rather than to the practice direction.

### **Option 6:**

The implementation of a more rigorous case management system has attractions assuming that it can be managed without satellite litigation.

### **Option 7:**

The use of disclosure assessors would be likely to increase costs considerably – though it might also result in significant savings in trial costs. It could usefully be piloted before a view was taken.

### **Option 8:**

We do not consider that it would be appropriate to adopt these procedures, given that we doubt that there is a major problem and substantial procedures are currently in place.

### **Option 9:**

This proposal might cause significant disadvantages to the party seeking disclosure, who may be opposing a large corporation or Government Department. The costs threat would be a significant disincentive to such a party. Moreover, the question of whether or not the documents were of 'real value' would need to be debated in another hearing and would therefore increase costs further. We are therefore against the introduction of this.

### **Option 10:**

A single judge would reduce costs and we fully support this.

## **8.3 Witness statements and experts reports**

### **Witness statements**

The Society believes that preparation and service of written witness statements narrows issues at an early stage and has been instrumental in fewer cases reaching trial. They also lead to more cogent expert evidence being developed.

The process of written articulation of the evidence results in greatly increased input from solicitor or counsel to the evidence in chief compared to simple oral evidence from the witness. This is likely to be of importance, however, to both in assessing the likely success of the case, in enabling issues to be identified and in encouraging settlement.

We contend that the suggestion that witness statements could be reduced in scope to focus only on drawing out of documents which are not readily apparent is flawed and does not reflect the reality of the process. In a world where clients are increasingly cautious about the progress of a case and the costs incurred, they want to see the structure of argument before trial.

We are concerned that any attempt to introduce minimal disclosure alongside reduced witness statement requirements will be met by the opposition requesting all documents.

### **Expert reports**

The evidence we have seen on this matter is piecemeal and out of date and the issue is of such importance that there needs to be further research undertaken before the Society can give any detailed view on the matter. However, there appears to be a widely held view that experts' fees are a major costs issue and the Society considers that the CJC would be the appropriate forum to review this issue with relevant stakeholders.

However, experts fees remain of concern as they significantly increase the cost of litigation. There is an argument that the court should have the ability to assess experts' fees.

The point made in the preliminary report that the CJC are reviewing CPR Part 35 needs to be clarified. We are not aware that this is taking place.

## **8.4 Case management**

### **Introduction**

The Law Society agrees that:

- Increased use of specialist judges will assist with the reduction of costs
- A pro-active case management system is the key to proportionate costs and support the view taken by Brooke, LJ in *King v Telegraph Group Ltd* [2004].
- Simplification of the rules and process is needed

- There should be a greater examination of the prospective costs of the case but with the caveat that concerns about proportionality should not inhibit access to justice or the right to a fair hearing.
- A review of costs cannot ignore the high cost of experts' fees, which can be the most significant of all disbursements in many cases. However, this needs to be coupled with stronger judicial training in the control over the use of experts so that they are able to identify when an expert is likely to be needed.

## **The rules**

The Law Society considers that the overriding objective is not applied as rigorously or as consistently as it should be.

The most infrequently applied rules are those that are available to control the progress of a case. Lord Woolf introduced a number of ways in which this could be achieved (most notably CPR Parts 1.1, 1.4 and 3.1), but the experience of practitioners suggests that in practice these are not used fully or at all. Therefore we question whether further rules would bring any benefit unless they are applied fully. We suggest there needs to be a change in the attitudes of the judiciary and court users so that court rules are fully complied with and applied in practice. The unhelpful practice of 'local practice directions' which has developed in some courts should be abolished and strictly policed.

We support the possibility of sanctions to bolster effective case management and compliance with the rules. However, as stated previously, sanctions raise the likelihood of satellite litigation. The threat of sanctions will also result in an increased amount of correspondence from solicitors justifying their conduct and this will add to the cost of a case. We therefore believe that sanctions should not be used as a standard response.

## **Pre Action Protocols (PAP)**

The Society considers that pre action protocols have been one of the successes of the Woolf reforms. There can be no doubt that they have assisted in effecting the early settlement of many cases prior to the issue of proceedings.

One reason for their success is that most of the protocols were drafted by 'experts' involved in the litigation process. The Law Society facilitated the stakeholder groups which drafted the first four protocols. This responsibility was then passed over to the CJC which has recently announced a consultation on pre action protocols which will be completed by the end of 2009. The consultation will involve all relevant stakeholder groups and the Law Society is pleased that it has once again been asked to assist with facilitating those groups.

This will be an opportunity for a complete review of all existing protocols, including their suitability and cost effectiveness, and whether or not more protocols should be introduced.

The Law Society considers that the CJC's proposals will be the best forum to discuss all

the issues concerned with the protocols and therefore urges Jackson LJ to defer any recommendations in that respect, including sanctions for breach, to the CJC.

## **8.5 Steps in case management**

### **Allocation and process to trial**

The system of allocating cases to one of three tracks has generally worked well since the introduction of the CPR. The Government has relatively recently increased the original fast track limit from £15,000 to £25,000 and this increase will remove a considerable number of cases from the multi track. This will result in more cases proceeding to trial quicker and at lower cost. However, this may reduce access to justice for those involved in complicated cases or personal injury claims.

### **Interim hearings**

Whilst interim hearings are a necessity, and could increase with more intensive case management, they do incur costs and consequently the more interim hearings in a case, the more costs budgeting problems are encountered.

One of the Society's main concerns is the manner in which courts list interim hearings. There continue to be many complaints from court users that too many interim hearings are listed at the same time. This frequently causes a backlog resulting in considerable waiting times for advocates whilst at court and is a major factor which increases costs.

One way to resolve this would be to make more use of telephone hearing facilities, which do not involve waiting and travel times.

## **8.6 Judiciary and court proceedings**

The Law Society supports the use of specialist judges and docketing but such a system would necessitate a significant change to the judicial system. We also support the use of IT. We believe that the cost of implementation (£60m) is affordable and that such a system will result in substantial cost savings. The lack of resources allocated to the civil justice court system, more than anything else, is likely to seriously hamper any improvements which may be suggested by Jackson LJ.

## **8.7 Settlement and the use of ADR**

The Law Society continues to support the use of all forms of ADR in circumstances where it may be assist the parties to come to terms and they are willing to do so. We also support the principle of 'legal proceedings as a last resort only'. However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation – some may well be mediated which are more suitable for trial, and vice versa. We consider that firmer guidelines are needed on what is and is not suitable for mediation.

Since *Halsey*, solicitors are aware of the consequences of failing to consider ADR and advise their clients accordingly. All solicitors engage in negotiations which is the simplest form of ADR and many civil litigation practitioners are also registered mediators but they frequently report that mediation can increase the costs of a case. More research on ADR and costs is therefore required.

## **8.8 Trials**

### **Costs associated with trials**

The Law Society agrees that system of fast track trials appears to operate well but there continues to be significant problems associated with the costs of multi track trials. This is frequently put down to applying a 'Rolls Royce' system to all cases. We must accept that any litigant is entitled to a fair hearing whatever the value or complexity. The only way therefore to achieve a more proportionate outcome so far as costs are involved is through change to the process.

## **8.9 Cost capping**

### **Introduction**

As we have indicated, cost capping may, in certain cases be an appropriate way of limiting costs. However, it needs to be done before costs are incurred and, in doing so, the court should concentrate not just on the level of costs but also on the steps to be taken otherwise inequality of arms will be perpetuated despite appearances to the contrary. There is a real danger that the effect of costs capping will be that powerful defendants are advantaged at the price of justice to claimants.

### **Rules 44.18 - 44.20 of the Civil Procedure Rules**

In the Law Society's view, the criteria in these paragraphs are correct and reflect decided cases that developed the jurisdiction.

### **The use of costs capping in *Tunbridge Wells***

- Simply capping costs without controlling process is not enough to address an inequality of arms.
- A harsh costs capping regime could lead to a reduction in access to justice.
- It must be remembered that costs capping does not limit the amount a party may spend on litigation, it merely limits the amount which may be recovered from an unsuccessful party.

We repeat that it is essential that there is a thorough look at the system and processes before further cost capping is introduced.

## **8.10 Should the costs shifting rule be modified?**

Considerable care will need to be taken before the modification of the costs shifting rule takes place. In particular, defendants who are not backed by insurance or who choose to self-finance should not be at a disadvantage. Similarly, the Society supports the principle that a successful claimant should be entitled to receive 100 per cent of the amount awarded by the court. This is particularly important in clinical negligence claims but applies to most others. The 100 per cent recovery principle has recently been considered by the Court of Appeal in *Thompstone* and others which endorsed the importance of the principle.

The only way in which cost-shifting could justifiably be modified would arise if there were a wholesale change to English law on damages so that a significant element for legal costs were included there. Alternatively, the insurance industry, Government and other major defendants would need to agree to a system that effectively meant that they could not recover costs, in return for not having to pay any ATE premiums. This would need to be achieved without creating significant injustice for successful defendants who are not insured.

## **8.11 The recoverability of success fees and ATE premiums**

There can be no doubt that the recoverability of success fees and ATE premiums has increased the costs burden for unsuccessful defendants. One thing which is frequently overlooked is that ATE provides for payment of an adverse costs order when a party successfully defends proceedings. This was not the case when the unsuccessful party was in receipt of public funding. They therefore provide protection for successful defendants.

To the four questions raised by Lord Justice Jackson at the end of chapter 47 the Society responds as follows:

- i) The appropriateness of the levels of success fees currently set in different types of litigation?

The Law Society believes this is impossible to answer without empirical evidence and we would be prepared to consider this further once further research has been undertaken and analysed. Such research would need to take account of the costs of financing the case and of the overheads of a solicitors practice.

- ii) The appropriateness of the levels of ATE premiums currently charged in different types of litigation?

Again the Law Society is unable to give a view on this until such time as empirical evidence has been obtained and considered. We are concerned that these premiums are high, but there is no information from the industry about the level of risk and the profitability of these policies. We consider that further investigation into the level of premiums is warranted.

- iii) Should success fees and ATE premiums continue to be recoverable under costs orders?



Yes as the 100 per cent recovery of damages principle must be maintained.

- iv) If not, (a) what steps should be taken to provide for the funding of personal injuries litigation: (b) what other steps should be taken to preserve access to justice for those who currently depend upon success fees and ATE insurance?

We do not believe that these questions arise and do not accept that alternatives, such as a CLAF will provide any significant answer to the problems that would be caused by changes to the system.

## **8.13 Costs management**

### **Introduction**

The Law Society agrees with the definition of costs management adopted in this chapter. However, there needs to be caution in approaching the concept as way of controlling costs from the inception of a case to its conclusion. Frequently, because of the effect of PAPs costs have already been incurred before a claim form has been issued. These can be substantial. Furthermore, costs management is unlikely to find an occasion for expression until the first CMC by which time yet further costs will have been incurred in the form of the preparation and service of case statements.

### **Relevant costs management rules within the CPR**

The Society agrees that the Court has long had power to manage costs within the CPR in their present form. The costs capping jurisdiction in Part 45 is simply one method but one not to be confused with costs budgeting.

The question as to the effect of a costs estimate remains unresolved despite interminable litigation. This central question must be addressed if costs management in terms of budgeting is to develop effectively in this country's civil justice system.

Sometimes the reason for the difficulty with estimating is not immediately clear and care and skill is very important when estimating costs.

We agree that a more detailed breakdown of costs is required. The format adopted in the Birmingham Pilot is a good starting point. Our serious reservation about the pilot is that it will last for insufficient time (only 3 months) to make any sound judgments. To make matters worse, it takes place over the summer months further compounding this flaw. The pilot should be continued for at least a year to generate reliable data.

A more detailed breakdown of estimated costs would be very time consuming and provide very little insight. Further research is required as to how this would operate in practice and what benefits would be derived.

### **What does costs management entail?**

- i) Costs budgeting

This is a term which describes the association of a budget with specific steps in the course of civil litigation and has been extensively used by some firms of solicitors as part of the management of their retainer with their client. Some firms use computer programs which they have developed in house but others use an Excel spreadsheet which works effectively. The crucial characteristic is that budgeting takes place prospectively whereas other forms of costs management are reactive.

Budgeting is not costs capping although the terms have been used interchangeably by the profession and the judiciary for some years as this section of the Report makes clear.

ii) Costs management – a form of project management

The Law Society's Civil Justice Committee supports Professor Peysner's approach to the project management of litigation and some of its members have worked with him in developing those ideas. Support was also shown for the concept at the Law Society's Multi Track event in February 2009 which Jackson LJ attended.

In commercial litigation a database of hours per task is more elusive as the cases vary so much. However, this does not mean an allocation of time cannot be made. The database reposes within the collective experience of practitioners who apply their professional experience.

The Law Society agrees with the points made about a possible approach in Chapter 48 paragraphs 3.15-3.20 inclusive of the preliminary report. However, such project management will come at a price as budgets/estimates take time to prepare and authorise which will add to the costs of a case (see 8.14.3.4 below).

The experience of the preparation of very high cost case plans for the Legal Services Commission should be considered. In family matters they were quickly abandoned and remain in clinical negligence matters in a much modified form.

iii) Taking costs management one stage further

If the cost of litigation is to be controlled then the 'price tags' referred to in paragraph of chapter 48 must be appended to stages and further restrictions must be placed on the steps parties may pursue taking into account the value and complexity of the case in question. Otherwise the realisation of proportionate litigation and effective case/costs management will not be achieved.

iv) The cost of costs management

Costs will increase as a result of costs management. This is so because of the following factors:

- a) Most solicitors do not provide detailed estimates to their clients at the moment and to start doing so will incur additional costs, which may not be beneficial.

- b) Those that do provide estimates do so more by way of a simpler calculation and not the kind of detailed breakdown that costs budgeting will require.
- c) These realities are not discouraged by solicitors' professional rules. The Code of Conduct 2007 (2009 revision) is as quoted in footnote 249. However, the Code and guidance<sup>14</sup> make it clear that it is understood that it will often be impossible to tell what the overall costs will be and that solicitors do not breach their duties in providing incomplete information in such circumstances. In such cases, the rules provide for estimates for a limited period, coupled with review dates.
- d) Completing the detailed estimates in the format required by the court will take additional time and familiarisation for solicitors. The court will have to demonstrate the value of this information to justify the additional work and cost involved.
- e) Further time will have to be spent at a CMC than is at present spent dealing with the allocation of time and costs to each step.

Having made those points, none of them is a reason for not undertaking budgeting. The additional costs are likely to be offset by real savings costs if the budgeting regime is applied effectively. The approach contemplated in the Solicitors Practice Rules of estimates for a limited period supplemented by review dates could be adopted successfully, in our view.

Such a process will have to be bolstered by specialised judicial training in respect of solicitors' costs (see below).

- v) Are judges capable of costs management?

Our responses to the 5 answers quoted in this section by Jackson LJ are as follows:

- a) Whilst it is true that an increasing number of judges are former solicitors they remain in a minority.
- b) We agree that judges should receive proper training. Bearing in mind the low level of resources applied to providing effective IT (despite the entreaties made by Lord Woolf that such resources were vital to the success of his reforms) we are sceptical of the likelihood of any further resources being made available.
- c) We agree that case statements and skeletons should assist to facilitate costs management.
- d) On balance, we do not believe that judges should be asked to apply their judicial expertise in areas in which they do not have any prior knowledge.
- e) We agree that, in the vast majority of cases, agreement is likely to be reached between the parties' solicitors as to the costs associated with a timetable for use at a CMC.

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<sup>14</sup> Rules 2.03(7) and guidance note 36

- vi) The argument that costs management is alien to our legal culture

In principle the Law Society agrees with the six points set out in paragraph 3.28 for the introduction of costs budgeting. However, it should not be forgotten that restricting the amount of recoverable costs can lead to an inequality of arms as the court does not, and presumably will not, have the power to restrict the amount a party wishes to spend on making or defending a claim.

### **Costs management and its application**

We believe that the costs management regime should apply to all courts and do not understand why the Commercial Court should be exempted from the regime. No rationale for this suggestion was included in the report.

### **Review**

We comment on the six points made as follows:

- i) The Law Society is not certain exactly what the terms 'feature' or 'adjunct' mean in relation to case management but we see costs management, coupled with case management, as a potential way to reduce costs, particularly in, but not restricted to, multi track cases.
- ii) Section 6 of the CPD should be elevated to a rule.
- iii) Existing rules are sufficient (once CPD section 6 becomes a rule).
- iv) No further amendments are required to the rules
- v) Form H is inadequate for the task of costs budgeting. A breakdown of stages with an allocation of units of time and a cost per unit showing the fee earners to be deployed in an MSExcel format is required. The forms used in the Birmingham Pilot are a good starting point and the form can be amended with experience.
- vi) The term 'draconian' may be inflammatory. It is possible that in some higher value/more complex disputes the Court should be directing the steps which a party can be taken in accordance with the overriding objective and directing the maximum level of recoverable costs associated with each step subject to review in case of unexpected developments and with the use of a reasonable contingency.

## **9 Regimes where there is no costs shifting**

There are public policy reasons why the costs shifting rule does not apply in Employment Tribunals and that only very modest amounts can be recovered by a successful party in the small claims track. This results in successful litigants who

choose to use a solicitor in those cases being liable to pay the legal costs out of their own pocket which can result in hardship for some.

## **10 The assessment of costs**

### **10.1 Summary assessment**

#### **Introduction**

The Society believes that summary assessment has broadly worked well. Judges tend to take a pragmatic view by deducting a certain amount from the successful party's statement of costs thereby achieving rough justice for the parties. The requirement to pay within 14 days can be a serious issue for parties and concentrates minds.

There are two problems which practitioners have highlighted:

The judiciary is frequently faced with considerable claims in interlocutory matters because the rules require a schedule to be prepared. The costs of producing the schedules can be considerable. The judiciary have little experience of costs assessment generally and tend either to deal with claims piecemeal (unfairly some may say) or to refer the matter to a formal costs assessment thereby increasing costs.

A practice has regrettably grown up which effectively ignores the principle of summary assessment in that the judge who has just heard the substance of the matter can take a broad-brush view of the appropriate costs. If damages are settled on a matter listed for a one day trial, many solicitors will now insist on their costs as drawn on the summary schedule being agreed as well. If not, they say they will go ahead with the hearing in order to have the summary assessment carried out, despite the fact that the judge will not have heard the substantive case and therefore has no basis on which to carry out such an assessment. Many county court judges will go along with this and it is contrary to what was intended by the summary assessment process.

#### **The benefits and drawbacks of the present summary assessment regime**

Broadly speaking the views are that summary assessment is one of the successes of Lord Woolf's reforms.

#### **Options for reform**

The Society does not propose a case for reform. The system has its faults but it works in that it provides a broad-brush approach which does not cause significant injustice to either side. A more fundamental question is to ask how summary assessment may be accommodated within a system of costs management.

## **10.2 Detailed assessment**

### **Introduction**

The process formerly known as taxation under the RSC is known as detailed assessment under the CPR. Little has changed between the two regimes except for subtle changes of procedure which have, largely, been helpful.

If the costs management proposals set out in the preliminary report are accepted it would seem that detailed assessment will have a place only in the context of cases where the receiving party's costs significantly exceed the budget. We would support this.

### **Concerns about the present system**

We agree with the concerns expressed in this section of the Report and would only add the following:

The length of the Points of Dispute is a significant problem.

- The cost of preparing the bill is significant. Very often costs draftsmen are paid on a deferred and/or CFA basis (as to which see the points well made in chapter 53, paragraph 4.11 of the preliminary report).
- The lack of effective IT as between the court user and the court administration in the civil justice system is something to which we have already drawn attention in this submission. For reasons associated with the security and integrity of email networks it is highly unlikely that any ad hoc system would be able to be used in the SCCO. This Review should not hesitate in asking for resources to address this.

## Conclusion

The Law Society has very serious concerns about the pace with which the Review is being conducted. The Preliminary Report raises many serious issues which call for careful reflection before forming final conclusions. The timescale which applies at present cannot, in our view, result in recommendations which reduce costs without risking a detrimental effect on access to justice and the consumer's fundamental right to a fair hearing.

Jackson LJ and his panel of Assessors have contemplated massive changes, many of which divide opinion generally within the whole legal profession. In view of that, it will be essential that any proposals for change must be the subject of further, discrete consultations to refine them. It will also be crucial for pilots to take place to assess the effects such changes may have on consumers and their rights.

It will be essential that any changes take account of the need to ensure that solicitors are able to provide the necessary services to clients and maintain access to justice for all claimants and defendants. The effect of changes on the income streams of the profession will need to be considered so that appropriate adjustments and phasing can be achieved.

The Law Society does not oppose change. Nor does it seek to defend practices which are outmoded, inefficient or increase costs. We have suggested and agreed with a number of proposals in the report. We will be very happy to work further with Jackson LJ and his team with a view to achieving real efficiencies in the costs system. These, however, will have to be undertaken with the consent of all sides and looking at all the cost drivers – including those of procedure and court administration – but must meet the overriding need to achieve proper access to justice. However, any further discussions need to be timetabled over a reasonable period of time to be effective.

Appendix

